Supreme Court, U.S.
FILED

No. 02 1 6 3 JUN 2 9 2002

In The

Supreme Court of the United States

AMERICAN FAMILY ASSOCIATION, INC., et al.,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

BRIAN FAHLING
Counsel of Record
STEPHEN M. CRAMPTON
BRUCE W. GREEN
MICHAEL J. DEPRIMO
BRYAN J. BROWN
Counsel for Petitioners
American Family Association
Center for Law & Policy
P.O. Drawer 2440
Tupelo, MS 38803
(662) 680-3886

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

94 pg

QUESTIONS PRESENTED

Petitioners sponsored a newspaper ad aimed at proselytizing the homosexual community. The ad explained Petitioners' religious belief that God loves homosexuals and that homosexuals can change through the love of Christ. By resolutions and official correspondence, Respondents denounced the Petitioners' and the ad's message as murderous, urging television media not to run the ad. Applying the *Lemon* test, the lower court found no constitutional violations. The questions presented are:

1. Whether the *Lemon* test is the proper test to apply in cases of overt or facial hostility to religion.

2. If not, what is the proper test.

3. Whether Respondents' resolutions and letter were hostile to religion in contravention of the Establishment Clause.

4. Whether the Respondents' resolutions and correspondence interfered with Petitioners' efforts to proselytize in contravention of the Establishment Clause and/or Free Exercise Clause.

5. Whether the resolutions and letter established an orthodoxy of belief in contravention of the Free Speech Clause.

LIST OF PARTIES

Petitioners:

American Family Association, Inc.
Donald Wildmon
Kerusso Ministries
Family Research Council

Respondents:

City and County of San Francisco
Leslie Katz, in her capacity as a member of the San Francisco Board of Supervisors

CORPORATE DISCLOSURE STATEMENT

AFA, Inc. is a Mississippi non-profit corporation. It has not issued shares or debt securities to the public. AFA has no parent company, and no publicly-held company has a ten percent (10%) or greater ownership interest in AFA.

Kerusso Ministries is an Alaskan non-profit corporation. It has not issued shares or debt securities to the public. Kerusso Ministries has no parent company, and no publicly-held company has a ten percent (10%) or greater ownership interest in Kerusso Ministries.

Family Research Council is a non-profit corporation incorporated in the District of Columbia. It has not issued shares or debt securities to the public. Family Research Council has no parent company, and no publicly-held company has a ten percent (10%) or greater ownership interest in Family Research Council.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION	2
STATEMENT	2
A. The Ministries, Their Advertisement, and the City's Response	3
B. Proceedings Below	5
REASONS FOR GRANTING THE WRIT	10
I. The Court of Appeals' Interpretation and Application of the Religion Clauses Are in Conflict with this Court's Decisions and Will Aggravate the Already Existing Confusion in the Lower Courts as to this Court's Interpretation and Application of Those Clauses	10
II. The Decision of the Court of Appeals is Erroneous	12
III. The Questions Presented Are Important	16
CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES:

American Family Association, Inc. v. City and County of San Francisco, 277 F.3d 1114 (9th Cir. 2002) 1

Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993) 8, 9, 15

Edwards v. Aguillard, 482 U.S. 578 (1987) 11

Engle v. Vitale, 370 U.S. 421 (1962) 15

Kunz v. New York, 340 U.S. 290 (1951) 9, 14

Larson v. Valente, 456 U.S. 228 (1982) 6, 11, 13, 16

Lee v. Weisman, 505 U.S. 577 (1992) 15

Lemon v. Kurtzman, 403 U.S. 602 (1971) ..... *passim*

Lynch v. Donnelly, 465 U.S. 668 (1984) 6, 7, 11, 13

Marsh v. Chambers, 463 U.S. 783 (1983) 14, 15

Martin v. City of Struthers, 319 U.S. 141 (1943) 9, 14

McDaniel v. Paty, 435 U.S. 618 (1978) 9, 14

Vernon v. City of Los Angeles, 27 F.3d 1385 (9th Cir. 1994) 7, 8

Wallace v. Jaffree, 472 U.S. 38 (1985) 7, 13, 14

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES:

U.S. Const. amend. 1 ..... 2, 3

28 U.S.C. §1254(1) 1

28 U.S.C. §1331 2

28 U.S.C. §1343(3)(4) 2

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. §1983 2

Rule 12(b)(6), Fed. R. Civ. P. 5

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The undersigned counsel of record, on behalf of petitioners American Family Association, Inc., Donald Wildmon, Kerruso Ministries, and Family Research Council, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled proceeding.

OPINIONS BELOW

The opinion for the court of appeals, App., *infra*, 1-22, is reported at 277 F.3d 1114. The order for the court of appeals, App. *infra*, 57-58, denying petitioners' petition for rehearing and rehearing *en banc* is unreported. The opinion and order of the district court, App., *infra*, 23-56, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2002. App., *infra*, 1-22. The court of appeals denied a timely petition for rehearing and rehearing *en banc* on April 30, 2002. App., *infra*, 57-58. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION

The First Amendment to the United States Constitution as incorporated by the Fourteenth Amendment.

STATEMENT

Petitioners, a Christian minister and three Christian ministries (hereafter referred to collectively as the "Ministries"), filed a 42 U.S.C. §1983 lawsuit against the City and County of San Francisco and Leslie Katz (in her official capacity as a member of the Board of Supervisors) (hereafter referred to collectively as the "City") in October 1999 in the United States District Court for the Northern District of California, invoking the jurisdiction of the district court under 28 U.S.C. §1331 because plaintiffs' claims arose under the Constitution of the United States, and under 28 U.S.C. §1343(3)(4) (jurisdiction over claims for deprivation of rights under color of any State law, statute, ordinance, regulation custom or usage). The Ministries alleged that the City violated their rights under the First Amendment of the Constitution when it adopted resolutions and sent to them correspondence which "denounce[d]," App., *infra*, 63-64, the Ministries and their religious beliefs regarding homosexuality as had then recently been set forth in an advertisement sponsored by the Ministries and carried in the San Francisco Chronicle. The Ministries also challenged, as a violation of their First Amendment rights, the City's resolution urging local television stations not to broadcast their television ad, which, like their newspaper ad, was designed to proselytize the homosexual community.

A. The Ministries, Their Advertisement, and the City's Response

This case involves fundamental questions under the First Amendment about the right of religious people and groups to express their views in the public square without the government expressly condemning those views and without intentional interference by the government with their efforts to proselytize. These questions arise, in part, because the court of appeals applied the *Lemon* test in this case of overt hostility to religion when this Court has clearly said the test does not apply to such cases. Additionally, there is a subsidiary question concerning the court of appeals holding that the purpose prong of the *Lemon* test, even in cases of overt hostility to religion, is satisfied by any secular purpose when this Court has said the actual or primary purpose must be secular. A further question arising from the lower court's decision is whether the City was within the bounds of the First Amendment when it adopted a policy "denounc[ing]" the Ministries and their religious beliefs. And finally, there is the question of whether the First Amendment was transgressed when the City adopted a resolution urging media not to carry the Ministries advertising campaign, an ad campaign intended to proselytize the homosexual community.

In 1998, the Ministries joined together to sponsor a nationwide advertising campaign called "Truth in Love." The advertising campaign, utilizing newspapers and television, was intended to proselytize homosexuals and encourage them to leave that lifestyle. In connection with the campaign, a full page advertisement was carried in the San Francisco Chronicle in 1998. App., *infra*, 59-62. The ad stated, in part, "[w]e believe every human being is precious to God and is entitled to respect. But when we see

great suffering among homosexuals, it's an inherent Christian calling to show compassion and concern" and "we want to share the hope we have in Christ for those who feel acceptance of homosexuality is their only hope." *Id.* Together with its direct religious messages, the ad also cited statistics that purported to demonstrate that homosexuality is an unhealthy lifestyle: "Homosexual behavior is not healthy behavior when it accounts for a disproportionate number of sexually transmitted diseases (STD's) . . . when 65% of all reported AIDS cases among males since 1981 have been men engaged in homosexual behavior." *Id.*

The City formally responded to the ad in October 1998 by adopting Resolution No. 873-98, App., *infra*, 67-68, and by correspondence, *id.* at 63-64. In its correspondence to the Ministries and others, the City "denounc[ed]" the Ministries, *id.*, for their "hateful rhetoric against gays, lesbians and transgendered people." *Id.* The letter also stated that the murder of Matthew Shepard in Wyoming "is in part due to the message being espoused by your groups." *Id.* The letter continued: "It is not an exaggeration to say that there is a direct correlation between these acts of discrimination, such as when gays and lesbians are called sinful and when major religious organizations say they can change if they tried, and the horrible crimes committed against gays and lesbians." *Id.*

In Resolution No. 873-98, *id.* at 67-68, the Ministries were described as a "radical religious political conservative coalition" and it was stated that "[a]dvertising campaigns which insinuate sexual orientation can be changed by conversion therapy or other means are erroneous and full of lies. . . . " *Id.* The resolution concluded by "urg[ing] local television stations not to broadcast advertising campaigns

aimed at 'converting' homosexuals." *Id.* The Ministries, after Resolution No. 873-98 was adopted, attempted to purchase air time to place their ads on San Francisco television stations. No San Francisco station would accept the ads. In March 1999, the City responded to the death of Billy Jack Gaither, a man in Alabama who was murdered allegedly because he was a homosexual, with Resolution No. 234-99, which concluded by calling "for the Religious Right to take accountability for the impact of their long-standing rhetoric denouncing gays and lesbians, which leads to a climate of mistrust and discrimination that can open the door to horrible crimes, such as those committed against Mr. Gaither." *Id.* at 65-66.

The question presented by the City's response to the Ministries' ad, broadly stated, is whether a governmental entity that formally and expressly "denounces" a particular religious belief and those who adhere to it, and which formally requests that television stations not broadcast the Ministries' proselytizing ad, has demonstrated hostility to religion in contravention of the prescriptions of the First Amendment.

B. Proceedings Below

In the district court, the City moved under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the Ministries' claims. The district court granted the motion as to all claims. In its opinion, the district court analyzed the Ministries' Establishment Clause claims under the *Lemon* test. The district court acknowledged that the City "attack[ed] as 'discrimination' plaintiffs' religious conclusion that homosexual conduct is sinful," but determined that it "cannot find any basis for concluding

. . . that an impermissible purpose wholly motivated defendants' conduct." *Id.* at 31. The City's secular concerns with the Ministries' message in the ad, said the district court, would prevent a reasonable observer from "read[ing] the disapproval of religious views as the primary effect of defendants' conduct." *Id.* at 34. The district court "stress[ed] the real substance of the instant case," *id.* at 36, as it saw it, saying, "Plaintiffs in effect assert that draping opinions that harbor secular, public policy implications in religious terms insulates the viewpoint from government reaction, whether in the form of approval or disapproval." *Id.*

The district court dismissed the Ministries' suit and a timely appeal was taken to the United States Court of Appeals for the Ninth Circuit. In a 2-1 decision, the court of appeals affirmed the district court ruling. A timely petition for rehearing and rehearing en banc was filed and an order to deny the same was entered on April 30, 2002. Judge Noonan, who dissented from the panel decision, voted to grant the petition for panel rehearing and recommended rehearing en banc. No judge of the full court requested a vote on en banc rehearing.

In determining how it would analyze this case of overt hostility to religion, the court of appeals did not follow this Court's decisions which hold that the *Lemon* test is "intended to apply to laws affording a uniform benefit to all religions and not to provisions that discriminate among religions." *Larson v. Valente*, 456 U.S. 228, 252 (1982) (footnote omitted); *see also Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (noting that the Court did not "find *Lemon* useful in *Larson* . . . where there was substantial evidence of overt discrimination against a particular church"). Instead, the court of appeals found that "the *Lemon* test

accommodates the analysis of a claim brought under a hostility to religion theory as well." App., *infra*, 7 (citation omitted). It then "agree[d] with the district court that although the letter and resolutions may appear to contain attacks on the Plaintiffs' religious views, in particular that homosexuality is sinful, there is also a plausible secular purpose in the Defendants' actions – protecting gays and lesbians from violence – and that therefore the Plaintiffs could not state a claim under the purpose prong." App., *infra*, 8. In so finding, the court of appeals applied its own "precedent that any secular purpose suffices. . . . " *Id.* The court of appeals was aware that this Court's "purpose test" might be more restrictive, requiring that the "actual" or "primary" purpose must be secular. *Id.*; *see Lynch,* 465 U.S. at 690-91 (Justice O'Connor noted in her concurrence that the purpose prong "is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes"); *Wallace v. Jaffree,* 472 U.S. 38, 56 (1985) (noting that a court must look to " 'whether government's actual purpose is to endorse or disapprove of religion' "). The court of appeals did not state that the City's "apparent" attacks would have survived scrutiny if this Court's more restrictive "purpose test" had been used.

To determine the primary effect of the City's letter and resolutions, the court of appeals relied upon *Vernon v. City of Los Angeles*, 27 F.3d 1385 (9th Cir. 1994), where the court concluded that an investigation by the City into whether an officer's religious views were improperly influencing his performance could not reasonably be construed to send as its primary message the disapproval of the officer's religious beliefs. *Id.* at 1399. In *Vernon* there were no statements denouncing the officer's religious beliefs, only inferences to be drawn from the fact of the investigation. In the instant case, the court of appeals

believed that from the documents it could "be inferred that the Defendants are hostile towards the religious view that homosexuality is sinful or immoral." Nevertheless, believing *Vernon* to be apposite, the court of appeals concluded that "the primary effect of these documents as encouraging equal rights for gays and discouraging hate crimes, and any statements from which disapproval can be inferred only incidental and ancillary." App., *infra*, 11.

Judge Noonan, dissenting from the ruling, considered the primary effect of the letter and the October resolution to be unmistakably hostile to the Ministries' religion, arguing, "to assert that a group's religious message and religious categorization of conduct are responsible for murder is to attack the group's religion. . . . The way the City found to rebuke the plaintiffs was to assert that their message was murderous. It is difficult to think of a more direct attack." *Id.* at 19. Judge Noonan compared the City's actions with a hypothetical city council today that adopted a resolution condemning Islam because its teachings embraced the concept of a holy war and stating that those teachings were "directly correlated" with the bombing of the World Trade Center. *Id.* at 20. He then inquired, "[w]ould any reasonable, informed person doubt that the primary effect of such action by a city could be the expression of official hostility to the religion practiced by a billion people?" *Id.*

As to the Ministries' Free Exercise claim, the court of appeals found that without an allegation of a substantial burden on their exercise of religion, the letter and resolutions would not support such a claim. The court of appeals further found this Court's pronouncement that a "law targeting religious beliefs as such is never permissible," *id.* at 13, quoting *Church of Lukumi Babalu Aye, Inc. v.*

Hialeah, 508 U.S. 520, 533 (1993), does not extend to "non-regulatory or non-compulsory governmental action." *Id.*

The court of appeals also found unpersuasive the Ministries' claim that the letter and resolutions constituted viewpoint discrimination and imposed an orthodoxy of belief, ruling instead that they fell within the principle "that public officials may criticize practices that they would have no constitutional ability to regulate, so long as there is no actual or threatened imposition of government power or sanction." App., *infra*, 16. Judge Noonan argued, however, that the Ministries' allegation of "official action blocking access to the air because the city disapproved of the plaintiffs' beliefs is surely sufficient to state a claim of free speech and free exercise of religion denied." *Id.* at 21. Judge Noonan concluded his dissent by stating, "[t]he plaintiffs have alleged a case where the fixed star has been obscured and an official orthodoxy prescribed." *Id.* at 21-22.

The court of appeals did not directly address the Ministries' claim that the City's condemnation of their ad and the resolution urging local television stations not to broadcast the ad violated the twin constitutional precepts that government may not interfere with efforts to proselytize or worship in public places nor may it seek to shield its citizens from those who would solicit them with their religious beliefs, *McDaniel v. Paty*, 435 U.S. 618, 640 (1978) (plurality opinion) (*citing Kunz v. New York*, 340 U.S. 290 (1951) and *Martin v. City of Struthers*, 319 U.S. 141 (1943)), other than to say that there was no sanction or threat of sanction by the City, which, the court of appeals concluded, left the ministries without valid claims. App., *infra*, 16-17.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision, which employed the *Lemon* test in this case of overt hostility toward religion, conflicts with this Court's decisions which hold that the *Lemon* test is not intended to apply to actions that discriminate against religion. Furthermore, as the court of appeals acknowledged regarding its application of the "purpose prong" of the *Lemon* test, its "precedent that any secular purpose suffices," App., *infra*, 8, may be in conflict with this Court's pronouncements as to the meaning of that prong. *Id.* And finally, there are the related questions of whether government may interfere with efforts to proselytize in public places and whether it may it seek to shield its citizens from those who would solicit them with their religious beliefs by formally condemning the religious belief at issue and by formally requesting media not to run the proselytizing ads of the religious group. This case presents, through clear and undisputed facts, an opportunity to provide guidance on these questions of fundamental importance. Moreover, the decision below is erroneous, and the issues that it addresses are important.

I. The Court of Appeals' Interpretation and Application of the Religion Clauses Are in Conflict with this Court's Decisions and Will Aggravate the Already Existing Confusion in the Lower Courts as to this Court's Interpretation and Application of Those Clauses

The Ninth Circuit's conclusion that "the *Lemon* test accommodates the analysis of a claim brought under a hostility to religion theory," *id.* at 7, is in conflict with this Court's decisions which hold that the *Lemon* test is

"intended to apply to laws affording a uniform benefit to all religions and not to provisions that discriminate among religions." *Larson*, 456 U.S. at 252 (footnote omitted); *see also Lynch*, 465 U.S. at 679 (noting that the Court did not "find *Lemon* useful in *Larson* . . . where there was substantial evidence of overt discrimination against a particular church"). Employment of the *Lemon* test in cases of overt hostility toward religion such as the instant case is likewise in conflict in principle with this Court's admonition that government may not be hostile to religion. *Id.* The conflict arises out of the constitutionally antithetical notion that government, charged with having an attitude of wholesome neutrality toward religion, can be overtly hostile to religion so long as there is a secular purpose for the hostility.

Furthermore, in *Edwards v. Aguillard*, 482 U.S. 578 (1987), this Court noted, concerning the purpose prong of the *Lemon* test, that a court must look to "whether government's actual purpose is to endorse or disapprove of religion." *Id.* at 585 (quoting *Lynch*, 465 U.S. at 690) (Justice O'Connor noted in her concurrence that the purpose prong "is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes"). The court of appeals, however, in evaluating the City's letter and resolutions, applied its own "precedent that any secular purpose suffices. . . . " App., *infra*, 8. The Ninth Circuit's "any secular purpose suffices" approach to the purpose prong of the *Lemon* test, then, is in conflict in principle, if not in fact, with this Court's pronouncements on the subject.

The Ninth Circuit's use of the *Lemon* test in this case of overt hostility to religion is not only flatly contrary to this Court's decisions, but it further clouds an already

bewildering array of discordant lower court Establishment Clause decisions. Moreover, under the reasoning of the Ninth Circuit, if a government merely recites "a plausible secular purpose," App., *infra*, 8, justifying its overt hostility toward religion, it will thereby inoculate itself against successful constitutional challenge. Without correction by this Court, and in the face of the confusion about this Court's Establishment Clause jurisprudence, the Ninth Circuit's decision will likely result in other lower courts exonerating governmental hostility toward religion on the same slim reed of secular purpose. State courts whose religion clauses are viewed as coextensive with the federal clauses are likely to follow the Ninth Circuit's lead as well. The Court should grant certiorari to review these important conflicts.

II. The Decision of the Court of Appeals is Erroneous

This Court's decisions teach that the *Lemon* test is not the proper test in cases of overt hostility to religion. The Ninth Circuit, nevertheless, found that "the *Lemon* test accommodates the analysis of a claim brought under a hostility to religion theory." *Id.* at 7. Moreover, the Ninth Circuit erroneously concluded that the purpose prong of the *Lemon* test is satisfied by "any secular purpose." From these erroneous premises, the Ninth Circuit erroneously concluded that the letter and resolutions: 1) were not hostile to the Ministries' religion, 2) did not seek to shield citizens from the Ministries' religious beliefs, 3) did not interfere with the Ministries' efforts to proselytize in public places, 4) did not constitute viewpoint discrimination, and 5) did not impose an orthodoxy of belief.

This Court has ruled that the *Lemon* test is "intended to apply to laws affording a uniform benefit to all religions and not to provisions that discriminate among religions. *Larson*, 456 U.S. at 252 (footnote omitted); *see also Lynch*, 465 U.S. at 679 (noting that the Court did not "find *Lemon* useful in *Larson* . . . where there was substantial evidence of overt discrimination against a particular church"). The court below ignored this clear teaching, finding that "the *Lemon* test accommodates the analysis of a claim brought under a hostility of religion theory. . . . " App., *infra*, 7. In this case where there is substantial evidence, indeed, unimpeachable evidence of hostility to religion, the court below chose to analyze it under the very test this Court has said does not apply. The decision produced as a result of rejecting the Court's decisions turns the Establishment Clause on its head.

Compounding its error in employing the *Lemon* test, the court below applied its own "precedent that any secular purpose suffices. . . . " *Id.* at 8. Though unmoved, the lower court acknowledged that this Court's "purpose test" might be more restrictive, requiring that the "actual" or "primary" purpose must be secular. *Id.*; *see Lynch,* 465 U.S. at 690-91 (Justice O'Connor noted in her concurrence that the purpose prong "is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes"); *Wallace,* 472 U.S. at 56 (noting that a court must look to " 'whether government's actual purpose is to endorse or disapprove of religion' "). The court of appeals concluded that because the City had a "plausible secular purpose," App., *infra*, 8, in "protecting gays and

lesbians from violence," the City's means to that end, *i.e.*, formally asserting that the Ministries' religious beliefs are murderous,[1] *id.* at 63-64, 65-68, survived the purpose prong. Similarly, the lower court found that "the reasonable, objective observer would view the primary effect of these documents as encouraging equal rights for gays and discouraging hate crimes. . . . " *Id.* at 11. These conclusions by the lower court are not only manifestly wrong, they are irrational and make a mockery of the principle that government "may not be hostile to any religion. . . . " *Marsh v. Chambers,* 463 U.S. 783, 802 (1983) (internal quotation marks and citation omitted).

The court below also rejected the Ministries' claims that when the City took official action condemning its ads that encouraged homosexuals to repent of their sin and turn to Christ, and "urge[d] local television stations not to broadcast advertising campaigns aimed at 'converting' homosexuals," App., *infra*, 67-68, it transgressed the twin constitutional precepts that "[g]overnment may not interfere with efforts to proselytize or worship in public places, . . . [nor may it] seek to shield its citizens from those who would solicit them with their religious beliefs." *McDaniel v. Paty*, 435 U.S. 618, 640 (1978) (plurality opinion) (*citing Kunz v. New York,* 340 U.S. 290 (1951) and *Martin v. City of Struthers,* 319 U.S. 141(1943)). Though the "government may not as a goal promote 'safe thinking' with respect to religion . . . ," *McDaniel*, 435 U.S. at 641, that is precisely

---

[1] The letter, for example "denounce[d]" as "hateful rhetoric" the religious teachings of "major religious organizations" and blamed them for "[w]hat happened to Matthew Shepard . . . and the horrible crimes committed against gays and lesbians. . . . " App., *infra*, 63-64.

what the City did when it condemned the Ministries' religious views on homosexuality. Nevertheless, the lower court rejected the direction this Court gave in *Lukumi*, that a "law targeting religious beliefs as such is never permissible," 508 U.S. at 533, finding instead that no substantial burden had been alleged, and thus no viable claim stated. App., *infra*, 14.

Finding that the City "may have criticized Plaintiffs' speech (or at least the effect of it) and urged television stations not to air it, there was no sanction or threat of sanction . . . ," *id.* at 16, without which, said the lower court, the Ministries had no free speech claim. *Id.* The lower court erred because religious matters are not like most issues in which the government may be influenced by and take part as a partisan: "with regard to matters that are essentially religious . . . the Establishment Clause seeks that there should be no political battles, and that no American should at any point feel alienated from his government because that government has declared or acted upon some 'official' or 'authorized' point of view on a matter of religion. *Marsh,* 463 U.S. at 805 (Brennan, J., dissenting). Moreover, "[a]s a practical matter, of course, anytime the government endorses [or denounces] a religious belief there will almost always be some pressure to conform. 'When the power, prestige and financial support of government is placed behind [or in opposition to] a particular religious belief, the indirect coercive pressure upon religious minorities to conform, to the prevailing officially approved religion is plain.'" *Lee v. Weisman,* 505 U.S. 577, 605 n. 6 (1992) (Blackmun, J., concurring) (quoting *Engle v. Vitale,* 370 U.S. 421, 431 (1962)). The City's vitriolic and explicit policy statement condemning the Ministries' religious beliefs, and its interference with

the Ministries' efforts to proselytize, undoubtedly brings coercive pressure on dissenters to conform to the City's officially approved orthodoxy of belief on the subject of homosexuality.

Accordingly, the court of appeals' decision conflicts both in principle and in fact with this Court's decisions. This Court should, therefore, grant the Ministries' petition to correct the Ninth Circuit's error.

III. The Questions Presented Are Important

The lower court's rejection of this Court's teaching, regarding the types of cases in which the *Lemon* test should and should not be used, undermines the integrity of the entire judicial branch. And because the victim of that failure is religion and its adherents, the injury suffered is all the more acute. History and human nature counsel that multiplication of the error in lower courts is inevitable unless this Court grants certiorari. This is particularly true in the area of Establishment Clause jurisprudence where lower courts candidly profess confusion in understanding how they are to analyze cases that come before them under that head. The soil from which error can grow and flourish in the lower courts, then, is made the more fertile by that confusion and uncertainty.

Resolution of the question of what is the appropriate test to apply in cases of overt hostility to religion is important. It is important not only because the court of appeals rejected the Court's instruction that the *Lemon* test does not apply in such cases, but because it is not at all clear what test this Court would apply. The compelling governmental interest test applied in *Larson* would not seem to provide an appropriate analytical framework for

such cases. Indeed, in light of this Court's teaching that hostility to religion is never permitted, it appears inherently contradictory to suggest that a test can be applied to determine if a court should permit what this Court has said is never permitted. At least in cases of overt hostility, the better approach, it seems, would be to determine if overt hostility has actually occurred – decided, perhaps, by evaluating the facts, via applied common sense (the reasonable, objective observer?), within the dictionary definition of "hostility." If hostility is found, and hostility is never permitted, then the result is certain. A decision by this Court would remove the very real possibility of the court of appeals' error gaining currency in the lower courts, and it provides an exceptional opportunity to clarify for the lower courts how they are to analyze Establishment Clause cases that are not suitable for application of the *Lemon* test.

Moreover, familiar to everyone are the variety of mediums used by various religions to proselytize, including, for example, the pulpit, going door-to-door, and the use of newspaper and television advertisements and programs to communicate the message of the faithful. Review of the lower court's decision is important because the court of appeals failed to recognize, or did not care, that the Ministries used their ad to honor, and to attempt to fulfill, what Christians refer to as the Great Commission. That is, Christ's charge to His Apostles to preach the gospel – to proselytize. The flashpoint for the City's animus toward the Ministries was this religious message publically communicated via newspaper. The Ministries also attempted to communicate their message by television, an effort that was interfered with by the City who took formal action urging television stations not to run the

ad. App., *infra*, 67-68. The City's actions were unquestionably aimed at marginalizing and driving the Ministries' religious message out of the public square. The court of appeals ratified the City's actions, if not its animus. Unless the decision below is reviewed and reversed, there will remain in place an officially authorized and prescribed judicial template for protecting and perpetuating intolerance and animus by government toward religion.

In sum, the court of appeals decision conflicts in principle and in fact with decisions of this Court, and, left undisturbed, will likely result in significant perpetuation of its error, certainly in the Ninth Circuit, but also by courts in other circuits and state courts as well. This case presents an opportunity for this Court to bring much-needed clarity and uniformity to its Establishment Clause jurisprudence. Therefore, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BRIAN FAHLING
Counsel of Record
STEPHEN M. CRAMPTON
BRUCE W. GREEN
MICHAEL J. DEPRIMO
BRYAN J. BROWN
Counsel for Petitioners
American Family Association
Center for Law & Policy
P.O. Drawer 2440
Tupelo, MS 38803
(662) 680-3886

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN FAMILY ASSOCIATION, INC.; DONALD WILDMON; KERUSSO MINISTRIES; FAMILY RESEARCH COUNCIL,

Plaintiffs-Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO; LESLIE KATZ, in her capacity as a member of the San Francisco Board of Supervisors,

Defendants-Appellees.

No. 00-16415

D.C. No. CV-99-04469-SBA

OPINION

Appeal from the United States District Court
for the Northern District of California
Saundra B. Armstrong, District Judge, Presiding

Argued and Submitted
November 7, 2001 – San Francisco, California

Filed January 16, 2002

Before: John T. Noonan, Michael Daly Hawkins, and A. Wallace Tashima, Circuit Judges.

Opinion by Judge Hawkins;
Dissent by Judge Noonan

COUNSEL

Brian Fahling and Stephen M. Crampton, AFA Center for Law & Policy, Tupelo, Mississippi, and Peter Hagberg, Oakland, California, for the appellants.

Louise H. Renne, Randy Riddle, Ellen Forman, Teresa L. Stricker, Rafal Ofierski, Deputy City Attorneys, San Francisco, California, for appellees City and County of San Francisco and Leslie R. Katz.

OPINION

HAWKINS, Circuit Judge:

American Family Association, Inc., Donald E. Wildmon, Kerusso Ministries and Family Research Council (collectively, "Plaintiffs") appeal the district court's dismissal of their Section 1983 action for failure to state a claim. In their complaint, Plaintiffs alleged that the City and County of San Francisco violated the First Amendment and the California Constitution by formally disapproving of an advertising campaign that espoused the view that homosexuality is a sin and that homosexuals could change their sexual orientation. Because the defendants' actions did not violate the First Amendment, we affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiffs joined other religious groups in sponsoring an advertising campaign called "Truth in Love." In connection with the campaign, a full page advertisement was carried in the San Francisco Chronicle in 1998. The ad proclaimed that Christians love homosexuals, but that "God abhors any form of sexual sin," whether it is homosexuality, premarital sex or adultery. The ad recognized that a strong same-sex urge drives homosexuality, but stated that everyone "makes a choice in yielding to temptation." It claimed that many have walked out of homosexuality into sexual celibacy or even

marriage through the help of Jesus Christ, and depicted a recent gathering of a nationwide ex-gay ministry organization. The ad stated:

> For years, Christians have taken a stand in the public square against aggressive homosexual activism. We've paid a heavy price, with sound-bite labels like "bigot" and "homophobe." But all along we've had a hand extended, something largely unreported in the media . . . an open hand that offers healing for homosexuals, not harassment. We want reason in this debate, not rhetoric. And we want to share the hope we have in Christ, for those who feel acceptance of homosexuality is their only hope.

The ad also indicated that the Christian groups wanted to help people to reject self-destructive behavior. It quoted statistics that homosexual behavior "accounts for a disproportionate number of sexually transmitted diseases," that "65% of all reported AIDS cases among males since 1981 have been men engaged in homosexual behavior" and that "homosexual youth are twenty-three times more likely to contract STD's than heterosexuals." The ad also claimed that studies revealed a high degree of destructive behavior among homosexuals, including "alcohol, drug abuse and emotional and physical violence."

On October 19, 1998, the San Francisco Board of Supervisors sent a letter to Plaintiffs,[1] the body of which read:

---

[1] The letter was also addressed to Newt Gingrich, Trent Lott and Jesse Helms, who are not plaintiffs in the appeal.

> Supervisor Leslie Katz denounces your hateful rhetoric against gays, lesbians and transgendered people.
>
> What happened to Matthew Shepard is in part due to the message being espoused by your groups that gays and lesbians are not worthy of the most basic equal rights and treatment.
>
> It is not an exaggeration to say that there is a direct correlation between these acts of discrimination, such as when gays and lesbians are called sinful and when major religious organizations say they can change if they tried, and the horrible crimes committed against gays and lesbians.

The City and County of San Francisco also adopted two resolutions. The first, Resolution No. 234-99, condemned the murder of Billy Jack Gaither in Alabama following a reported unwanted gay sexual advance, and urged Alabama lawmakers to extend their hate crimes legislation to include offenses related to sexual orientation. The final paragraph of the Resolution "calls for the Religious Right to take accountability for the impact of their long-standing rhetoric denouncing gays and lesbians, which leads to a climate of mistrust and discrimination that can open the door to horrible crimes such as those committed against Mr. Gaither."

The second resolution, No. 873-98, was specifically directed at "anti-gay" television advertisements. It recited that a coalition had introduced a nationwide television advertisement campaign to encourage gays and lesbians to change their sexual orientation, and listed one of the Plaintiffs by name. The resolution asserted that the organizations "promote an agenda which denies basic equal rights for gays and lesbians and routinely state their

opposition to toleration of gay and lesbian citizens" and stated that a "prominent San Francisco newspaper" chose to accept and publish a printed advertisement campaign. The resolution contended that "the vast majority of medical, psychological and sociological evidence supports the conclusion that sexual orientation can not be changed" and that ads insinuating as much are "erroneous and full of lies." The resolution also stated that ads suggesting gays or lesbians are "immoral and undesirable create an atmosphere which validates oppression of gays and lesbians" and encourages maltreatment of them. The Resolution claimed a "marked increase in anti-gay violence" that coincided with "defamatory and erroneous campaigns" against gays and lesbians. It then urged "local television stations not to broadcast advertising campaigns aimed at 'converting' homosexuals."

Following receipt of the letter and passage of the resolutions, Plaintiffs brought a Section 1983 action in district court against the City and County of San Francisco and Leslie Katz in her official capacity (collectively, the "Defendants"), alleging violations of the First and Fourteenth Amendments of the United States Constitution as well as certain provisions of the California Constitution. Plaintiffs alleged three causes of action: (1) a violation of the Establishment Clause, alleging San Francisco's actions disapproved of a particular religion; (2) a violation of the Free Exercise Clause, violating their right to free exercise of religion; and (3) a "hybrid" cause of action, violating their rights to free exercise of religion and chilling the exercise of their free speech rights. The Plaintiffs sought an injunction prohibiting the Defendants from "making any further official pronouncements or declarations against Plaintiffs or any other groups or individuals whose

religious beliefs include the belief that homosexuality is sinful and that homosexuals can change their homosexual practices," nominal damages and litigation costs.

Defendants moved to dismiss the Plaintiffs' claims under the federal and California Constitutions under Fed.R.Civ. P. 12(b)(6). The district court dismissed most of Plaintiffs' claims without leave to amend, but dismissed the Establishment Clause claim with leave to amend. Plaintiffs notified the court that they did not intend to file an amended complaint, and the court dismissed the entire action with prejudice. This appeal followed.

STANDARD OF REVIEW

This court reviews de novo a district court's dismissal for failure to state a claim pursuant to Rule 12(b)(6). *Two Rivers v. Lewis,* 174 F.3d 987, 991 (9th Cir. 1999). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Burgert v. Lokelani Bernice Pauahi Bishop Trust,* 200 F.3d 661, 663 (9th Cir. 2000). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. *Williamson v. General Dynamics Corp.,* 208 F.3d I144, 1149 (9th Cir.), *cert. denied,* 531 U.S. 929 (2000).

DISCUSSION

I. Establishment Clause

A. *The Lemon Test*

The Establishment Clause of the First Amendment to the United States Constitution provides that "Congress

shall make no law respecting an establishment of religion." U.S. Const. amend. I. This clause applies not only to official condonement of a particular religion or religious belief, but also to official disapproval or hostility towards religion. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or religion in general."); *Vernon v. City of Los Angeles,* 27 F.3d 1385, 1396 (9th Cir. 1994) ("the Establishment Clause is ... violated as much by government disapproval of religion as it is by government approval of religion.").

In *Lemon v. Kurtzman,* 403 U.S. 602 (1971), the Supreme Court established the now widely known "*Lemon* test" for analyzing government conduct under the Establishment Clause of the First Amendment. To survive the test, the government conduct at issue must (1) have a secular purpose, (2) not have as its principal or primary effect advancing or inhibiting religion and (3) not foster an excessive government entanglement with religion. *Id.* at 612-13. Although the *Lemon* test is perhaps most frequently used in cases involving government allegedly giving *preference* to a religion, the *Lemon* test accommodates the analysis of a claim brought under a hostility to religion theory as well. *See Vernon,* 27 F.3d at 1396 (applying *Lemon* test to claim that City of Los Angeles was hostile to plaintiff's religious beliefs). In conducting the *Lemon* analysis, we recognize that it is not our role to determine the factual correctness of the Plaintiffs' assertion that homosexual behavior can be changed, or of the Defendants' assertion that advertisements like the one used by the Plaintiffs contribute to a climate of violence.

1. *Secular Purpose*

"The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion." *Kreisner v. City of San Diego,* 1 F.3d 775, 782 (9th Cir. 1993) (quoting *Lynch v. Donnelly,* 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)). However, "[a] practice will stumble on the purpose prong 'only if it is motivated *wholly* by an impermissible purpose.'" *Kreisner,* 1 F.3d at 782 (quoting *Bowen v. Kendrick,* 487 U.S. 589, 602 (1988)) (emphasis added); *but see Vernon,* 27 F.3d at 1397 (acknowledging Ninth Circuit precedent that any secular purpose suffices, but noting that panel believes Supreme Court test is really that the "actual" or "primary" purpose must be secular).

Our analysis under this prong focuses purely on *purpose;* we do not question the propriety of the means to achieve that purpose or whether the defendants were correct or even reasonable in the assumptions underlying their actions, such as asserting a connection between the Plaintiffs' ads and an increase in violence against gays. Moreover, "[a] reviewing court must be 'reluctant to attribute unconstitutional motives' to government actors in the face of a plausible secular purpose." *Kreisner,* 1 F.3d at 782 (quoting *Mueller v. Allen,* 463 U.S. 388, 394-95 (1983)). We therefore agree with the district court that although the letter and resolutions may appear to contain attacks on the Plaintiffs' religious views, in particular that homosexuality is sinful, there is also a plausible secular purpose in the Defendants' actions – protecting gays and lesbians from violence – and that therefore the Plaintiffs could not state a claim under the purpose prong.

2. *Primary Effect*

Under the second prong of the *Lemon* test, we must consider whether the government action has the principal or primary effect of advancing or inhibiting religion. *Lemon,* 403 U.S. at 612. We conduct this inquiry from the perspective of a "reasonable observer" who is both informed and reasonable. *Kreisner,* 1 F.3d at 784.

Unlike the secular purpose prong, in which it appears that any secular purpose, no matter how minimal, will pass the test, the focus of this prong is on the *primary* effect of the government's conduct. Unfortunately, because it is far more typical for an Establishment Clause case to challenge instances in which the government has done something that favors religion or a particular religious group, we have little guidance concerning what constitutes a primary effect of inhibiting religion. The most instructive case in this circuit is *Vernon,* 27 F.3d at 1398-99. In *Vernon,* the City of Los Angeles conducted an investigation into whether an officer's religious views were improperly influencing his performance, including consulting religious elders on matters of policy, thwarting progress of gay and female officers, and refusing to arrest anti-abortion demonstrators. *Id.* at 1389. The court noted that although one might "infer possible city disapproval of his religious beliefs from the direction of the investigation, it could not objectively be construed as the primary focus or effect of the investigation." *Id.* at 1398-99.

With respect to the resolution urging Alabama lawmakers to adopt hate crimes legislation, it is fairly easy to conclude that the primary effect of this resolution is not inhibition of religion. Although the resolution contains a

provision calling "for the Religious Right to take accountability for the impact of their long-standing rhetoric denouncing gays and lesbians," this provision appears to be more of an afterthought and any disparagement of the Religious Right is not the primary effect of the resolution. Read as a whole, the primary effect is a denouncement of hate crimes and a call for action by the Alabama legislature. A reasonable, informed and objective observer would not view the primary effect of this resolution as inhibition of religion.

The other resolution and the letter to the Plaintiffs present a closer question. These documents are directly aimed at the Plaintiffs and both documents contain statements from which it may be inferred that the Defendants are hostile towards the religious view that homosexuality is sinful or immoral. Nonetheless, we believe the district court properly concluded that this was not the principal effect of the Defendants' actions. The documents, read in context as a whole, are primarily geared toward promoting equality for gays and discouraging violence against them. A number of the Defendants' statements are merely rebuttals of medical and psychological evidence cited by the Plaintiffs in their advertisement and not criticisms of the Plaintiffs' underlying religious beliefs. Certainly, the letter and resolution may contain overgeneralizations about the Religious Right, at times misconstrue the Plaintiffs' message, and may be based on a tenuous perceived connection between the Plaintiffs' advertisements and the increase in violence against gays and lesbians. This does not, however, make religious hostility the primary effect of the Defendants' actions. Again, our job is not to question the validity of the Defendants' assumptions or the wisdom of their corresponding

actions; rather, it is to determine the constitutionality of those actions. We believe a reasonable, objective observer would view the primary effect of these documents as encouraging equal rights for gays and discouraging hate crimes, and any statements from which disapproval can be inferred only incidental and ancillary. *See Vernon,* 27 F.3d at 1398-99.

3. *Excessive entanglement*

The excessive entanglement prong does not easily fit the current case. Plaintiffs argue that the Defendants' actions have encouraged political divisiveness along religious lines and that this is sufficient to constitute excessive entanglement with religion. Political divisiveness, however, "has never been relied upon as an independent ground for holding a government practice unconstitutional." *Brown v. Woodland Joint Unified School Dist.,* 27 F.3d 1373, 1383 (9th Cir. 1994) (internal citation and quotation omitted). Although Plaintiffs contend that homosexuality is an "emotionally explosive" issue that engenders political divisiveness, if this were enough to create an Establishment Clause violation on entanglement grounds, government bodies would be at risk any time they took an action that affected potentially religious issues, including abortion, alcohol use, other sexual issues, etc. *See id.* The district court properly concluded that the Defendants' actions did not create excessive entanglement with religion.

B. *State constitutional claims*

Because the Defendants' actions pass all three prongs of the *Lemon* test, Plaintiffs have failed to state a claim

under the Establishment Clause of the United States Constitution. This outcome dictates the result as to the Plaintiffs' state claims as well, because California courts also apply the *Lemon* test when analyzing violations of California's Establishment Clause. *Vernon,* 27 F.3d at 1396. Although California's "No Preference" Clause is sometimes considered more expansive and more protective of the separation principle than the United States Constitution, we have previously noted that this clause is only interpreted as more expansive when dealing with approval of religion cases, and has not been more expansive in cases involving disfavor of religion. *Id.* at 1402. Plaintiffs have thus also failed to state a claim under the California Constitution.

II. Free Exercise

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend I. Free exercise claims were traditionally analyzed under the balancing test established in *Sherbert v. Verner,* 374 U.S. 398, 402-03 (1963). Under the *Sherbert* test, conduct violates the Free Exercise Clause if it substantially burdens a religious practice and either is not justified by a substantial state interest or is not narrowly tailored to achieve that interest. *Vernon,* 27 F.3d at 1392. The *Sherbert* test was later modified by *Employment Division, Oregon Dep't of Human Resources v. Smith,* 494 U.S. 872 (1989), in which the Court held the test did not apply in challenges to neutral, generally applicable criminal laws. The Court then expanded on *Smith* in *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520 (1993), noting that a free exercise

violation hinges on showing that the challenged law is either not neutral or not generally applicable. *Id.* at 531-34.

Plaintiffs contend that in this case they are not required to demonstrate a "substantial burden" on their exercise of religion, and rely heavily on a quote from *Lukumi* that a "law targeting religious beliefs as such is never permissible." *Id.* at 533. Plaintiffs overlook a critical distinction, however: in this case, there is no actual "law" at issue. In fact, there does not appear to be any case in this circuit applying *Smith* or *Lukumi* to some non-regulatory or non-compulsory governmental action – in other words, to something other than an actual law. *See, e.g., KDM v. Reedsport School Dist.,* 196 F.3d 1046 (9th Cir. 1999) (Oregon regulation requiring special education services to be provided in "religiously neutral settings"); *Miller v. Reed,* 176 F.3d 1202, 1205 (9th Cir. 1999) (California Motor Vehicle Code requirements); *Johns v. County of San Diego,* 114 F.3d 874, 877 (9th Cir. 1997) (requirement that non-attorney parent must be represented by counsel when bringing action on child's behalf).

In *Vernon,* a post-*Smith* case, we continued to apply the *Sherbert* substantial burden test to government conduct that did not involve an actual regulation or criminal law. *See Vernon,* 27 F.3d at 1393 (applying *Sherbert* to challenge to government investigation into whether officer was consulting religious elders on police policy and favoring members of his church). In this case, Plaintiffs allege in the complaint that the Defendants' actions violated their free exercise rights and chilled the exercise

of their free speech rights.[2] We have previously explained, however, that when the challenged government action is neither regulatory, proscriptive or compulsory, alleging a subjective chilling effect on free exercise rights is not sufficient to constitute a substantial burden. *Vernon,* 27 F.3d at 1394; *see also Laird v. Tatum,* 408 U.S. 1, 11 (1972). The complaint does not otherwise allege any specific religious conduct that was affected by the Defendants' actions. The Plaintiffs have therefore failed to state a viable constitutional claim under the Free Exercise Clause of the United States Constitution or under the California Constitution. *See Vernon,* 27 F.3d at 1392 (discussing California's incorporation of federal law).

III. Hybrid Claim

In *Smith*, the Supreme Court noted that free exercise claims implicating other constitutional protections, such as free speech, could qualify for strict scrutiny review even if the challenged law is neutral and generally applicable. 494 U.S. at 881-82. In this circuit, to make out a hybrid claim, a "free exercise plaintiff must make out a colorable claim that a companion right has been violated." *Miller,* 176 F.3d at 1207 (internal quotation and citation omitted).

A. *Orthodoxy of Belief*

The Plaintiffs' first free speech argument is that the Defendants have prescribed an orthodoxy of belief on the

---

[2] The free speech issue is discussed in more detail in Section III below.

subject of homosexuality. Although Plaintiffs correctly cite dozens of cases for the principle that the government cannot prescribe matters of opinion or belief, all of these authorities involve conduct beyond mere criticism of speech by a governmental authority. *See, e.g., Glickman v. Wileman Brothers & Elliott, Inc.,* 521 U.S. 457 (1997) (challenge to compelled advertising assessments); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557 (1995) (challenge to state court decision that compelled private citizens to permit group in parade); *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622 (1994) (challenge to must-carry provisions of cable television act).

We agree with the host of other circuits that recognize that public officials may criticize practices that they would have no constitutional ability to regulate, so long as there is no actual or threatened imposition of government power or sanction. *See, e.g., Penthouse Int'l Ltd. v. Meese,* 939 F.2d 1011, 1015-16 (D.C. Cir. 1991) (public officials entitled to criticize publishers of pornography where letter contained no threat or intimation of intent to prosecute or prescribe publisher's conduct); *R.C. Maxwell Co. v. Borough of New Hope,* 735 F.2d 85, 89 (3d Cir. 1984) (letters which encouraged but did not threaten or intimidate landowner to terminate lease with billboard owner did not violate billboard owner's First Amendment rights); *Hammerhead Enters., Inc. v. Brezenoff,* 707 F.2d 33, 38-39 (2d Cir. 1983) (no violation where public official sent letters to retail stores requesting that they refrain from selling a controversial board game, as comments could not reasonably be interpreted as "intimating that some form of punishment or adverse regulatory action will follow" failure to comply); *cf. Bantam Books, Inc. v. Sullivan,* 372 U.S. 58,

68 (1963) (constitutional violation where Rhode Island commission's conduct amounted to "thinly veiled threats to institute criminal proceedings" against publishers who did not stop circulating publications on commission's list).

In this case, although the Defendants may have criticized Plaintiffs' speech (or at least the perceived effect of it) and urged television stations not to air it, there was no sanction or threat of sanction if the Plaintiffs continued to urge conversion of homosexuals or if the television stations failed to adhere to the Defendants' request and aired the advertisements. Therefore, the Plaintiffs have failed to allege a colorable free speech claim and the district court properly dismissed this portion of the hybrid claim.

B. *Viewpoint Discrimination*

The Plaintiffs' viewpoint discrimination claim fails largely for the same reason. In fact, the opening line in this section of their appellate brief demonstrates the problem: "The First Amendment does not permit the City to *impose special prohibitions* on those speakers who express views on disfavored subjects" (emphasis added). Again, the authorities cited by Plaintiff involve sanctions, denial of funding, or some affirmative consequence associated with a particular viewpoint. *See, e.g., Rosenberger v. Rector and Visitors of the Univ. of Virginia,* 515 U.S. 819 (1995) (University violated First Amendment by refusing to fund Christian student publication while funding other student publications). As with the orthodoxy claim, the Defendants have not imposed or even threatened any prohibitions or sanctions for the Plaintiffs' viewpoint. The district court properly determined that the Plaintiffs had

failed to allege a colorable viewpoint discrimination claim and properly dismissed this portion of the hybrid claim as well.

CONCLUSION

The district court properly dismissed the Plaintiffs' Establishment Clause claim because the Defendants' actions had a plausible secular purpose, did not have the primary effect of inhibiting religion and did not create excessive entanglement with religion. The district court properly dismissed the Plaintiffs' free exercise claim because the Defendants' conduct was neither regulatory nor proscriptive and Plaintiffs alleged no more than a subjective chilling effect on their free exercise of religion. The district court also properly dismissed Plaintiffs' hybrid free exercise/free speech claim because Plaintiffs had not stated a colorable free speech claim in that the Defendants' conduct did not sanction or threaten to sanction their speech.

AFFIRMED.

NOONAN, Circuit Judge, dissenting:

This case is a skirmish in the culture wars of the last century. Our culture has been the product, at least in part, of Jewish and Christian religious teaching; and the culture wars have, almost inevitably, brought about challenges to that teaching. The plaintiffs here emphasize the religious roots and religious nature of their message. The defendants focus on secular consequences of a message that they nonetheless maintain comes from a religious group using such a fundamentally religious category as sin.

We are not meant to be soldiers in the skirmish. We are asked, as much as it lies within our capabilities, to put aside our own freight of values and to put on the neutrality that our Constitution guarantees government will have in religious controversy. We are not asked to determine the religious or secular truth of the plaintiffs' message or the city's rebuttal. We have no competence to do so.

Not only are we disabled from entering the fray by our judicial role, but the posture of the case prevents us from digging into possibly relevant facts that a trial might disclose. We are ruling on a motion to dismiss for failure to state a cause of action. We are, therefore, confronting not facts but allegations. We are bound to accept the allegations as true. We are bound to read them with all reasonable inferences drawn in favor of the allegators [sic]. The opinion of the court fairly and accurately states the standard of review we are obliged to apply. My quarrel is with the way the standard is then applied.

It is also common ground for the panel that the Constitution prohibits official disapproval of, or official hostility towards, religion. Just as the Constitution by protecting the free exercise of religion assures the right of an atheist not to be compelled to swear by God, *Torcaso v. Watakins,* 367 U.S. 488, 495, n.11 (1961), so the Constitution assures religious believers that units of government will not take positions that amount to the establishment of a policy condemning their religious belief.

With agreement, then, as to the nature of our review and the constitutional criteria to be applied, where do the majority opinion and the dissent part company? First, as to the primary effect of the city's letter. The letter states that "what happened to Matthew Shepard" (that is, what

is taken to be generally known, Shepard's vicious murder by anti-gay assailants) was "in part due to the message being espoused by your groups." The letter further asserts "a direct correlation" between such an event and calling gays and lesbians "sinful." Similarly, the city's resolution "condemning the hate motivated murder of Billy Jack Gaither" begins with a condemnation of Mr. Gaither's murder and ends with a call on "the Religious Right" to "take accountability" for its rhetoric, which can "open the door to horrible crimes, such as those committed against Mr. Gaither." To assert that a group's religious message and religious categorization of conduct are responsible for murder is to attack the group's religion. The majority says that the city's letter and resolutions "may appear to contain attacks on the religions of the plaintiffs." The way that the city found to rebuke the plaintiffs was to assert that their message was murderous. It is difficult to think of a more direct attack.

The city is saved as to its purpose by its plausible purpose of seeking to reduce violence against gays and lesbians; but this plausible purpose does not neutralize the effect of the means chosen by the city – a means that achieves its effect by its assertion of a direct correlation between the plaintiffs' religious beliefs and the killing of human beings. It is difficult to believe that any informed and reasonable observer could think that the primary effect of the city's message was, "Don't incite violence against gays and lesbians." The city, well aware of the plaintiffs' advertising campaign proclaiming their love for homosexuals, knew that such a conventional admonition would have been brushed off as a bromide with an "Of course not." To reach the plaintiffs, to strike at what the city perceived as a danger, the city had to strike at the

heart of the plaintiffs' religious belief, to focus on their belief that the conduct they were trying to change was an offense to God and to make that belief responsible for murder.

Suppose a city council today, in the year 2002, adopted a resolution condemning Islam because its teachings embraced the concept of a holy war and so, the resolution said, were "directly correlated" with the bombing of the World Trade Center. Plausibly the purpose might be to discourage terror bombings. Would any reasonable, informed observer doubt that the primary effect of such an action by a city could be the expression of official hostility to the religion practiced by a billion people?

Consider the actual resolution of the city of Hialeah banning animal sacrifice. The plausible purpose of the resolution was to protect the health of the citizens of the city. Its primary effect was to prohibit ritual required by belief in Santeria. The way the city chose to protect health was to express hostility to a religious belief and inhibit its practice. The means chosen were unconstitutional. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993). So here the city had a plausible, indeed laudable purpose, to decrease vicious violence on account of sexual orientation. The city used a means that officially stigmatized a religious belief as productive of murderous consequences.

Both the letter and the resolution explicitly condemn hate crimes. Part of that condemnation is an attribution of responsibility for hate motivating the violence to the plaintiffs. By focusing on these hate crimes, San Francisco condemns both the crime and the source of the hate. The condemnation and the assignment of collective guilt are

unmistakably bound together in the letter and the resolution. The majority breaks the connection between condemnation of the crime and assignment of guilt, treating the latter as "an afterthought." While both readings are plausible, in an appeal from a motion to dismiss, drawing all reasonable inferences in favor of the non-moving party, the question cannot be decided at this stage.

A second point of disagreement with the majority: Its opinion states that, although the city urged television stations not to let the plaintiffs' message air, "there was no sanction or threat of sanction . . . if the television stations failed to adhere to [the] request." That conclusion is too narrow a reading of the complaint, which states: "Upon information and belief the San Francisco television stations refused Plaintiffs' ads at least in part because of the resolution of the Defendants urging them not to accept ads from Plaintiffs." A fair inference from the allegation is that the television stations were under some compulsion to respond to the city's urging. The allegation of official action blocking access to the air because the city disapproved of the plaintiffs' beliefs is surely sufficient to state a claim of free speech and free exercise of religion denied.

A comprehensive statement of our constitutional commitment to the freedom of ideas from official censorship, correction, or condemnation was made by Robert Jackson writing for the Supreme Court in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 642 (1943): "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion. . . . " The plaintiffs

have alleged a case where the fixed star has been obscured and an official orthodoxy prescribed.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

AMERICAN FAMILY ASSOCIATION,

Plaintiff,

v.

SF CITY & COUNTY,

Defendant.

/

No. C 99-04469 SBA

ORDER DISMISSING ACTION

(Filed Jun. 15, 2000)

This matter comes before the Court on plaintiff's Notice of Intent Not to File Amended Complaint and Request for Entry of Final Judgment. Pursuant to plaintiff's written notice that it does not intend to file an amended complaint, this action is hereby DISMISSED with prejudice. *See Lopez v. City of Needles,* 95 F.3d 20, 22 (9th Cir. 1996).

IT IS SO ORDERED.

Dated: 6-15-00

/s/ S B Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

AMERICAN FAMILY ASSOCIATION, Plaintiff(s), vs. CITY AND COUNTY OF SAN FRANCISCO, Defendant(s).	No. C 99-4469 SBA **ORDER** (Filed Jun. 5, 2000)

This matter now comes before the Court on defendants' Motion to Dismiss Plaintiffs' Federal and State Claims and to Strike Plaintiffs' Requests for Injunction and Damages Pursuant to Rules 12(b)(6) and 12(f) [#24-1] and defendants' Special Motion to Strike State Law Claims Pursuant to Section 425.16 of the California Code of Civil Procedure [#25-1]. Having read and considered the papers submitted by the parties and being fully informed, the Court hereby GRANTS defendants' Motion to Dismiss Plaintiffs' Federal and State Claims, GRANTS defendants' Motion to Strike Plaintiffs' Request for Injunction, DENIES as moot defendants' Motion to Strike Plaintiffs' Request for Damages, and DENIES defendants' Special Motion to Strike State Law Claims Pursuant to 425.16 of the California Code of Civil Procedure. Although the hybrid-rights, No Preference Clause, and Free Exercise claims are dismissed without leave to amend, the Establishment Clause claim under both the federal and state constitution is dismissed with leave to amend.

BACKGROUND

In 1998 Plaintiffs American Family Association, Inc., Donald E. Wildmon, Kerusso Ministries, and Family Research Council joined with others to sponsor a national advertising campaign called "Truth in Love." The general message of these ads is that Jesus Christ offers hope to those individuals who desire to change their homosexual lifestyle. As the following snippets indicate, the ads characterize homosexual conduct as sinful, discuss the purported health risks associated with homosexual behavior, and tout the hope for change offered by Jesus Christ:

- We believe every human being is precious to God and is entitled to respect. But when we see great suffering among homosexuals, it's an inherent Christian calling to show compassion and concern. The truth we know is that God abhors any form of sexual sin, be it premarital sex, adultery, prostitution, or homosexuality.

- Homosexual behavior is not healthy behavior when it accounts for a disproportionate number of sexually transmitted diseases, . . . when 65% of all reported AIDS cases among males since 1981 have been men engaged in homosexual behavior, and when homosexual *youth* are twenty three times more likely to contract STD's than homosexuals.

- Studies also show a high degree of destructive behavior among homosexuals, including alcohol, drug abuse and emotional and physical violence.

- [W]e want to share the hope we have in Christ, for those who feel acceptance of homosexuality is their only hope.

(First Amended Complaint at Ex. 1).

After running full page ads in several major newspapers, including one in San Francisco, plaintiffs began purchasing television commercial time, with the first commercial running in October of 1998. During a San Francisco Board of Supervisers ("the Board") meeting held on October 13, 1998, defendants City and County of San Francisco and Leslie R. Katz, a member of the Board Supervisors, allegedly (1) adopted a resolution calling on Congress to adopt hate crimes legislation and expressing that acts of discrimination such as calling homosexuality a sin should not be tolerated, (2) adopted a resolution urging local television stations not to broadcast advertising campaigns aimed at converting homosexuals, classifying such ads as "erroneous and full of lies" and "defamatory" and maintaining that violence and even death result from such campaigns, and (3) instructed Gloria Young, the Board's clerk, to write plaintiffs. On October 19, 1998, Young wrote in relevant part:

> Supervisor Leslie Katz denounces your hateful rhetoric against gays, lesbians and transgendered people.
>
> What happened to Matthew Shepard is in part due to the message being espoused by your groups that gays and lesbians are not worthy of the most basic equal rights and treatment.
>
> It is not an exaggeration to say that there is a direct correlation between these acts of discrimination, such as when gays and lesbians are called sinful and when major religious organizations say they can change if they tried, and the horrible crimes committed against gays and lesbians.

(Complt. at Ex. 2). In the aftermath of defendants' activities and allegedly as a result of defendants' resolution, no

local San Francisco television station has accepted plaintiffs' offers to buy time on the station to run their ads. In addition, defendants in March of 1999 adopted a resolution calling for the "Religious Right to take accountability for the impact of their long-standing rhetoric denouncing gays and lesbians, which leads to a climate of mistrust that can pen the door to horrible crimes, such as those committed against Mr. Gaither."

Plaintiffs now bring a civil rights action pursuant to 42 U.S.C. § 1983. In their First Amended Complaint, filed November 22, 1999, plaintiffs bring three claims against defendants[1]: (1) violation of Establishment Clause and article I, section 4 of the California Constitution; (2) hybrid violation of Free Exercise Clause, Establishment Clause, and Free Speech Clause and of article I, §§ 2, 3, and 4; and (3) violation of Free Exercise Clause and article I, section 4 of the California constitution. Plaintiffs move the Court to (1) enjoin defendants from "making any further official pronouncements or declarations against Plaintiffs or any other groups or individuals whose religious beliefs include the belief that homosexuality is sinful and that homosexuals can change their homosexual practices", (2) award nominal damages for defendants' unconstitutional actions, (3) grant costs, attorneys' fees, expenses, and other necessary and proper relief.

Defendants now file two separate motions. In their motion to dismiss and to strike under 12(b)(6) and 12(f), defendants move to *dismiss* plaintiffs' free exercise claims

[1] Katz is sued in her official capacity as a member of the San Francisco Board of Supervisors.

under both the federal and California constitutions, establishment clause claims under both the federal and California constitutions, no preference clause claim under the California constitution, hybrid claims under both the federal and California constitutions and to *strike* plaintiffs' request for a preliminary and permanent injunction and plaintiffs' request for nominal damages on their state constitutional claims. In their special motion to strike, defendants move to dismiss all of the state law claims under California's "anti-SLAPP statute."

STANDARD OF REVIEW

I. 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss should not be granted unless it appears beyond a doubt that the plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). For purposes of such a motion, the complaint is construed in a light most favorable to the plaintiff and all properly pleaded factual allegations are taken as true. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969); *Everest and Jennings, Inc. v. American Motorists Ins. Co.*, 23 F.3d 226, 228 (9th Cir. 1994). All reasonable inferences are to be drawn in favor of the plaintiff. *Jacobson v. Hughes Aircraft*, 105 F.3d 1288, 1296 (9th Cir. 1997). Dismissal is proper if the complaint fails to allege either a cognizable legal theory or sufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).

When the complaint is dismissed for failure to state a claim, "leave to amend should be granted unless the Court

determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). Leave to amend is properly denied "where the amendment would be futile." *DeSoto Yellow Freight Sys.*, 957 F. 2d 655, 658 (9th Cir. 1992).

II. 12 (f)

Federal Rule of Civil Procedure 12(f) permits the court, upon a party's motion, to "order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

DISCUSSION

I. Motion to Dismiss under 12(b)(6)

A. Federal and State Establishment Clause Claims

Although bloodied in the Supreme Court in recent years, the test established by *Lemon v. Kurtzman*, 403 U.S. 602 (1971), remains a viable tool in this Circuit for analyzing government conduct under the Establishment Clause. In order to survive the Establishment Clause under this test, the government conduct must (1) have a secular purpose, (2) not have as its principal or primary effect the advancement nor inhibition of religion, and (3)

not foster an excessive government entanglement with religion.[2] Lemon, 403 U.S. at 612-3.

1. Lemon Test

a. Secular Purpose

Government conduct reflecting an official purpose to disapprove of religion in general or of a particular religion violates the Establishment Clause. *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1396 (9th Cir. 1994). Only if the government practice is "motivated **wholly** by an impermissible purpose" will it wither under the purpose prong. *Kreisner v. City of San Diego*, 1 F.3d 775, 782 (9th Cir. 1993) (en banc) (internal quotation and citation omitted) (emphasis added). If the Court finds a "plausible secular purpose" present, it should be very reluctant to attribute impermissible motives to the government. *Id.*; *Bauchman v. West High School*, 132 F.3d 542, 554 (10th Cir. 1997).

In this case, the letter to plaintiffs and the various resolutions consistently and vociferously articulate secular purposes for protecting gays and lesbians from crimes and ensuring their equal rights and treatment. The dominant tone of the challenged writings and statements is an

---

[2] Prior to introducing the *Lemon* test, plaintiffs devote two pages of its opposition to establishing that the hostility exhibited by the defendants to plaintiffs' religious beliefs constitutes a violation of the Establishment Clause. (Opp'n at 6-8). The *Lemon* test, however, accommodates the analysis of a claim brought under a hostility theory. *See e.g. Vernon v. City of Los Angeles*, 27 F.3d 1385, 1396 (9th Cir. 1994) (employing the *Lemon* test after observing that the Establishment Clause is violated not just by government approval of religion but also disapproval of religion). Thus, the Court considers plaintiffs' observations in its *Lemon* analysis.

affirmation of the *civil* rights of this class of persons. Not only a plausible but an impassioned secular purpose pours forth from the challenged conduct. Protecting a class of people from statements that implicitly support or justify violence against them indisputably is a secular purpose. *Lumpkin v. Brown*, 109 F.3d 1498 (9th Cir. 1997) (finding a government official's interest in repudiating statements suggesting a justification for actions that may result in violence to constitute a secular reason). *Lumpkin*, which involved Mayor Brown's decision to remove from office a state official who implicitly endorsed violence against homosexuals, indicates the sincerity and plausibility of the City of San Francisco's commitment to this secular purpose. *Lumpkin*, 109 F.3d 1498.

A reasonable basis also exists for suspecting a more constitutionally pernicious, religious purpose as well. Defendants refer to plaintiffs' apparently sincere call to a rebirth for homosexuals as "hateful rhetoric." Likewise, they attack as "discrimination" plaintiffs' religious conclusion that homosexual conduct is sinful, an attack plausibly suggesting a motive to disfavor plaintiffs' religious beliefs. Finally, defendants occasionally refer to the proponents of the assailed viewpoint by religiously-charged appellations – "[t]he Christian right" and "[t]he radical religious political conservative coalition."

In short, both legitimate secular purposes and an impermissible religious purpose are plausible on the face of the complaint. Although plaintiffs allege that the "official purpose" of defendants' conduct was to disapprove of plaintiffs' religion or of religion in general, they fail to allege specifically either that this desire to express disapproval wholly motivated defendants' conduct or that defendants lacked altogether a secular purpose. *See*

Bauchman, 132 F.3d at 554-55 (finding that complaint failed to state an Establishment Clause claim under the purpose analysis of the "endorsement" test since a number of discernable, plausible, secular purposes existed for defendants' conduct and complaint failed to allege that defendants lacked a secular purpose). Absent such an allegation, the Court must conclude that the secular purposes are plausible since they are expressed on the face of the resolutions and letter, supported by the City's past practice as confirmed by *Lumpkin*, and buttressed by the undeniably secular features of the ads[3], such as the association of homosexuality with "destructive behavior." Even when viewing the allegations in the light most favorable to the plaintiffs, as we must, the Court cannot find any basis for concluding, particularly in the face of defendants' numerous references to violence, that an impermissible purpose wholly motivated defendants' conduct. *See e.g. Bauchman*, 132 F.3d at 555 (affirming district court's dismissal of Establishment Clause claim under Rule 12(b)(6)).

b. Principal or Primary Effect

The "effect" prong asks the Court to consider "whether it would be objectively reasonable for the government action to be construed as sending primarily a message of either endorsement or **disapproval** of religion." *Vernon*, 27 F.3d at 1398 (emphasis added). The Court conducts this objective inquiry from the perspective of a "reasonable observer," who is both informed and reasonable. *Kreisner*,

---

[3] Plaintiffs inaccurately characterize the ad as "wholly religious."

1 F.3d at 784. Her body of information includes the history behind the government practice at issue. *Id.*

By branding plaintiffs' reference to the sinfulness of homosexual behavior as a form of discrimination, defendants communicate their disapproval of plaintiffs' specific religious beliefs regarding homosexual behavior. That finding, however, is not dispositive under the effect prong. *See e.g. Vernon*, 27 F.3d at 1398-99 ("Notwithstanding the fact that one may infer possible city disapproval of [plaintiff's] religious beliefs from the direction of the investigation [conducted into his job performance], this cannot objectively be construed as the primary focus or effect of the investigation."). The focus is whether this message of disapproval is the primary effect of the government's conduct. *Id.* For instance, passages in a teaching aid series that allegedly endorse witchcraft but form only a small part of an otherwise unquestionably nonreligious series do not communicate to a reasonable observer a message of endorsement or disapproval of religion generally or a particular religion. *Brown v. Woodland Joint Unified School*, 27 F.3d 1373, 1381 (9th Cir. 1994). The Court must consider the message of disapproval in context. *Id.*

When considered in its proper context, the conduct at issue in this case does not lead the reasonable observer to construe disapproval of religion as its primary effect. Defendants' statements repeatedly refer to secular concerns, including violence against homosexuals, equal rights and treatment for homosexuals, and the allegedly flawed medical, psychological, and sociological basis of conversion therapy. The primary effect of the statements is a strong disavowal of the secular truth of plaintiffs' ads and an unmistakable lament for the purported secular consequences of ideas such as those contained in the ad.

A consideration of the City's past practice confirms this context-based conclusion. As the California Court of Appeals recognized more than twenty years ago, the San Francisco Board of Supervisors has developed a tradition of articulating public policy in resolutions regardless of its power to legislate in the particular policy field. *Eller Outdoor Advertising Co. of California v. Board of Supervisors of the City and County of San Francisco*, 89 Cal.App.3d 76, 80 (Cal.Ct.App. 1979). The Vietnam War serves as one defining example of such Board behavior. *Id.* The City's relatively recent reaction in strong, secular language and action to remarks by a City official regarding homosexuality witnesses to the City's practice of addressing in a secular manner controversial issues holding religious implications. *Lumpkin*, 109 F.3d at 1502. This reaction apparently resonated with the desires of the body politic. *Id.* at 1500 (noting that the people of San Francisco expressed outrage at the public official's statements).

In sum, consistent with both recent and more longstanding tradition, defendants aggressively addressed a matter of apparent concern to the people of San Francisco. Although plaintiffs' partially religiously-based comments served as the impetus, defendants couched their response in primarily secular terms. A reasonable observer would not read the disapproval of religious views as the primary effect of defendants' conduct.

c. Excessive Entanglement

Plaintiffs maintain that defendants' conduct violates the Establishment Clause by engendering political divisiveness along religious lines. Political divisiveness, however,

"has never been relied upon as an independent ground for holding a government practice unconstitutional." *Woodland*, 27 F.3d at 1383 (internal quotation and citation omitted); *see Feminist Women's Health Center, Inc. v. Philibosian*, 157 Cal.App.3d 1076, 1091 (Cal.Ct.App. 1984) (acknowledging that no case decided under federal constitution has held that political divisiveness is sufficient for a finding of unconstitutionality). It generally emerges as a consideration only in cases involving "direct government subsidies to sectarian institutions" or intentional government intervention into "overt, fundamental religious exercises or issues." *Id.* The instant case does not involve a direct government subsidy of any sort.

The real issue is whether the defendants have intervened in an overt, fundamental religious exercise or issue. In *Philibosian*, decided under California's Establishment Clause, the court ruled that the political divisiveness engendered by the government indirectly endorsing a religious burial service for aborted fetuses within the government's custody was alone sufficient to offend the excessive entanglement test in light of the emotional explosiveness of the abortion debate. *Philibosian*, 157 Cal.App.3d at 1091. Likewise, in *Lee v. Weisman*, 505 U.S. 577 (1992), the Supreme Court cited the political divisiveness arising from a school's choice of the religious figure who would conduct the invocation and benediction at a graduation ceremony. *Lee*, 505 U.S. at 587.

Whereas *Philibosian* and *Lee* involved governmental participation, direct or indirect, in a fundamentally religious exercise (a religious burial in one case and prayer in the other), the instant case lacks that character. Although the defendants indisputably discount the religious transformation envisioned by plaintiffs for homosexuals, they

do not in any way attempt to intervene in counseling or other services provided by plaintiffs to homosexuals. Any such "religious" exercise may proceed unencumbered. Thus, while defendants, as with the government in *Philibosian*, have added their voice to an issue of both secular and religious proportions, they have not involved themselves in any religious exercise to the extent that the political divisiveness generated by their conduct is alone sufficient to implicate the Establishment Clause. Moreover, to the extent plaintiffs deem their television ads a religious exercise, they have not presented any authority providing that a government's *indirect* attempts to frustrate (rather than support) a religious exercise, one purportedly threatening grave social consequences, is alone sufficient under either the California or federal excessive entanglement analyses. Regardless, plaintiffs' complaint fails to allege that television ads are an overt, fundamental religious exercise.

Stepping away from the three particular prongs of the *Lemon* analysis, the Court must stress the real substance of the instant case. Plaintiffs in effect assert that draping opinions that harbor secular, public policy implications in religious terms insulates the viewpoint from government reaction, whether in the form of approval or disapproval. *Lumpkin* roundly rejects any such position. Cloaking ideas in religious terms does not immunize them from official attack. In order to establish an Establishment Clause violation, plaintiffs must show something more than the mere fact of government approval or disapproval of the underlying idea. *Lemon* provides plaintiffs the tool to make such a showing. Plaintiffs' allegations fall short.

2. Other Tests

Plaintiffs also accuse defendants' conduct of jeopardizing freedom of conscience. Evoking lofty Supreme Court passages attesting to the grave danger to religious minorities from government endorsement of a particular religion, plaintiffs contend the same grave threat ensues from government disapproval of a particular religious viewpoint. (Opp'n at 9-11). Plaintiffs fail to cite even one case in which a court, employing a test other than the *Lemon* test, struck a message of government disapproval due to the impact of the message on religious minorities.[4] Thus, whether this analysis is separate from the *Lemon* analysis is dubious. Moreover, as already discussed, the defendants' disapproval in this case stemmed from secular, not religious, concerns and was articulated as such. A coercive impact on "religious minorities" is not clear.

As yet another basis for their suit, plaintiffs contend the City has evaluated the merits of differing religious claims. Its lone support for this theory is a concurring opinion in *Texas Monthly, Inc. v. Bullock*, 498 U.S. 1

---

[4] "Plaintiff dramatically confirms the absence of any such authority by deceptively inserting, albeit in brackets, the term "condemning" in place of "endorsing" and "adherent" in place of "nonadherent" (and vice versa) in the following excerpt from a concurring opinion: "Direct government action endorsing religion or a particular religious practice is invalid . . . because it 'sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the community.'" *Wallace v. Jeffries*, 472 U.S. 38, 69 (1985) (citation omitted) (O'Connor, J. concurring).

(1989).[5] Moreover, it relies on evidence not included in the complaint.

3. California Establishment Clause

California Courts consider the *Lemon* test when analyzing alleged violations of the California constitution's Establishment Clause. *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1396 (9th Cir. 1994); *Rowe v. The Superior Court of Los Angeles County*, 15 Cal.App.4th 1711 (Cal.Ct.App. 1993). Establishment claims frequently meet the same result under the California constitution that they would under the federal constitution. *Vernon*, 27 F.3d at 1396. *Philibosian*, already discussed in the excessive entanglement analysis, is plaintiffs' strongest case under the California constitution. In *Philibosian*, the court found both an absence of any clear secular purpose for the burial of the aborted fetuses and a primary effect of symbolic support for certain religious views. *Philibosian*, 157 Cal.App.3d at 1090-1. Here, a secular concern is clearly present and a message of religious disapproval is not the primary effect in the eyes of a reasonable observer. As in *Vernon*, also a federal and state establishment clauses case, the defendants' conduct, even though it communicated some disapproval for plaintiffs' partly religiously-based beliefs, was rooted in a plausible secular purpose(s), resulted primarily in a secular effect, and failed to constitute excessive entanglement.

For the above reasons, plaintiffs' claims under the federal and state Establishment Clauses are DISMISSED.

---

[5] Plaintiffs cite to the wrong page.

Although plaintiffs failed to indicate any facts that they could plead that could revive these claims, the Court cannot conclude that any amendment would prove futile. Thus, plaintiffs may file an amended complaint as to these Establishment Clause claims but only if in good faith they can allege that an improper religious purpose wholly motivated the City's conduct.

B. Free Exercise Claims under Federal and State Constitutions

Plaintiffs also bring Free Exercise Claims under both the federal and state constitutions. Prior to *Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872 (1989), the Sherbert balancing test governed the analysis of free exercise claims. *See NLRB v. Hanna Boys Center*, 940 F.2d 1295, 1305 (9th Cir. 1991). Pursuant to this test, government conduct ran afoul of the Free Exercise Clause if it substantially burdened a religious practice and either was not justified by a substantial state interest or was not narrowly tailored to achieve that interest. *Sherbert v. Verner*, 391 U.S. 398, 402-3; *Vernon*, 27 F.3d at 1392. The threshold analysis under this test was whether the government conduct substantially burdened the plaintiff's free exercise of his religion. *Id.* at 1392-3. *Smith* held this test inapplicable for free exercise challenges to neutral, generally applicable, criminal laws. *Smith*, 494 U.S. at 885.[6]

---

[6] A plaintiff can still bring a free exercise challenge to a neutral, generally applicable law, but, even if he can show a substantial burden, rational basis is the relevant level of scrutiny. *See Miller v. Reed*, 176 F.3d 1202, 1208 (9th Cir. 1999). The *Sherbert* balancing test still may apply, however, for hybrid-rights claims, which are discussed *infra*.

In a subsequent case involving a free exercise challenge to a city ordinance imposing criminal penalties, the Supreme Court described in more detail the parameters of the *Smith* analysis. It noted that a Free Exercise violation hinges on a showing that the government proscription or burden is either not neutral or not generally applicable.[7] *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531-4 (1993). In determining a law's neutrality, the focus is on the law's object. *Id.* at 532-33 If the law targets religious belief as such, then it is non-neutral and "never permissible." *Id.* at 533. Meanwhile, a law whose object "is to infringe upon or restrict **practices** (as opposed to beliefs) because of their religious motivation" is invalid unless justified by a compelling interest and narrowly tailored to serve that interest. *Id.* at 531 (emphasis and parenthetical added).

Lukumi failed to address whether, under the modified, *Smith* analysis, a plaintiff still needs as a threshold matter to demonstrate a substantial burden even if the law is not neutral and/or not generally applicable. Although *Lukumi* never addressed this issue, it implicitly found the criminal law to impose a substantial burden when it noted that ritualistic, animal sacrifice, the target of the ordinances at issue, was "one of the principal forms of devotion" for the Santeria religion. *Id.* at 524.

At least one Court of Appeals has expressly concluded that showing a substantial burden is not necessary when non-neutral government conduct is at issue. *See Brown v. Borough of Mahaffey, Pennsylvania*, 35 F.3d 846, 849 (3rd

---

[7] *But see* footnote 6.

Cir. 1994). *Brown* articulates a compelling rationale for such an approach:

> Applying such a burden test to non-neutral government actions would make petty harassment of religious institutions and exercise immune from the protection of the First Amendment. A burden test is only necessary to place logical limits on free exercise rights in relation to laws or actions designed to achieve legitimate, secular purposes. Because government actions intentionally discriminating against religious exercise a fortiori serve no legitimate purpose, no balancing test is necessary to cabin religious exercise in deference to such actions.

Brown, 35 F.3d at 849-50. This approach curried the favor of this Circuit's Justice Kleinfeld in a stirring dissent to a recent opinion. *KDM v. Reedsport School Dist.*, 196 F.3d 1046, 1055 (9th Cir. 1999) (Kleinfeld, J. dissenting) (noting that the extent of the burden on an individual's free exercise does not matter when a regulation is not neutral toward religion).

The Ninth Circuit has avoided directly addressing whether a substantial burden forms part of the *Smith* analysis. In the first half of the 1990s, the Court continued to apply the *Sherbert* test to government conduct not involving a criminal or regulatory law. *See Vernon*, 27 F.3d at 1393 n.1 (incorporating the reasoning of *Hanna Boys*, 940 F.2d at 1305). In a recent case, however, the Ninth Circuit extended the *Smith* analysis to a state provision, such as the instant one, that neither regulated nor criminally punished conduct. *KDM*, 196 F.3d at 1050. In *KDM*, which provoked the above-referenced dissent from Justice

Kleinfeld, the court concluded that the admittedly *non-neutral* Oregon regulation, which required school districts to provide any special education services in a "religiously-neutral setting," did not violate the Free Exercise Clause since it did not impermissibly burden anyone's free exercise of religion and did not reflect a purpose of suppressing religious conduct or belief. *Id.* at 1050-1. In dismissing the free exercise claim, the court repeatedly referred to the absence of an impermissible burden. These references lend themselves to three possible readings: the burden imposed in that case was not impermissible since it was not substantial; the burden was not impermissible since it was not the object of the regulation; or no impermissible burden existed since the regulation entailed no burden at all on anyone's free exercise rights. Justice Kleinfeld's dissent adopted the former reading, but the best reading of the opinion is the latter one. The court noted that the regulation neither "impinged" nor "burdened" plaintiffs' free exercise rights at all. Thus, *KDM* stands for the proposition that a plaintiff must at least show some burden on his free exercise rights in order to prevail on a free exercise claim even when the regulation at issue is non-neutral.

A burden consists of (1) interference (2) with a tenet or belief central to religious doctrine. *Vernon*, 27 F.3d at 1393 (citation omitted).[8] When a plaintiff asserts as his theory

[8] *Vernon* describes the relationship between these two concepts when discussing the substantial burden test: a plaintiff must demonstrate that the governmental action either "pressur[es] him or her to commit an act forbidden by the religion or prevent[s] him or her from engaging in conduct or having a religious experience which the faith mandates." *Id.* (internal quotation and citation omitted).

of interference that governmental conduct chills his Free Exercise right, he must demonstrate that the government conduct was regulatory, proscriptive, or compulsory in nature. *See id.* at 1394 (citing *Laird v. Tatum*, 408 U.S. 1, 11 (1972)). "[G]overnmental actions that merely offend or cast doubt on religious beliefs do not on that account violate free exercise." *Grove v. Mead School Dist.*, 753 F.2d 1528, 1543 (9th Cir. 1985). Moreover, even if governmental interference is established, the Free Exercise Clause is not implicated unless the interference is with the plaintiff's exercise of his religious beliefs. *See Hanna Boys*, 940 F.2d 1306.

In the instant case, plaintiffs allege that the policy pronouncements by the City chill the exercise of their free exercise rights. (FAC at ¶ 35). Based on the allegations in the complaint, the City's hortatory policy statements, however, do not, substantially or otherwise, regulate, proscribe, or compel any conduct by plaintiffs. Thus, any subjective chill they engendered is not a sufficient basis for a free exercise violation. To the extent plaintiffs rely on the response of the television stations to its ads, they provide no authority for concluding that third party conduct in response to hortatory governmental statements constitutes cognizable interference. In fact, plaintiffs' lone "authority" for its interference argument is a section from *Lee v. Weisman*, 505 U.S. 577 (1992), dealing with the *Establishment* Clause, not the Free Exercise clause. *Lee*, 505 U.S. at 588. Thus, their burden argument, which they mistakenly claim is unnecessary for this allegedly nonneutral government conduct, does not rely on any relevant authority.

When asked at the hearing, plaintiffs conceded that the California Free Exercise provision, although arguably

more protective, typically results in the same conclusion in California courts as the federal Free Exercise provision. In fact, plaintiffs advance no separate argument under the California Free Exercise provision. California cases indicate a general similarity between the two analyses. *Vernon*, 27 F.3d at 1392.

Because the complaint fails to allege any cognizable burden on plaintiffs' free exercise right, the Court need not consider whether, under *Lukumi*, defendants' conduct is neutral or generally applicable. Plaintiffs' claims under the Free Exercise Clauses of both the federal and state constitution are DISMISSED. Even though defendants sought dismissal without leave to amend, plaintiffs have not indicated to the Court that they can allege the existence of any cognizable burden nor have they requested leave to amend. These claims, unlike the Establishment Clause claims, are therefore dismissed WITHOUT LEAVE TO AMEND.

C. State No Preference Clause Claim

The California No Preference clause reads: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed." Cal.Const. art. I § 4. This provision holds both Establishment Clause and Free Exercise features, as some courts – similar to the Establishment Clause analysis – have focused on the objective effect of the government conduct and other courts have considered – similar to the Free Exercise Clause analysis – whether a substantial burden is present. *See Woodland*, 27 F.3d at 1385; *Smith v. Fair Employment and Housing Commission*, 12 Cal.4th 1143, 929-30 (Ca. 1996). To the extent this clause implicates a burden analysis, the

complaint clearly fails to allege any legally cognizable burden on plaintiffs' free exercise rights.

To the extent this clause implicates an assessment of the objective effect of government conduct, plaintiffs have failed to demonstrate that their allegations are sufficient. A plurality of the California Supreme Court has noted that California courts have interpreted the No Preference Clause as "more protective of the principle of separation than the federal guarantee." *Vernon*, 27 F.3d at 1396 (quoting *Sands v. Morongo Unified Sch. Dist.*, 53 Cal.3d 863 (Ca. 1991) (en banc) (internal quotation and citation omitted). Pursuant to this provision, government must "neither prefer one religion over another nor appear to act preferentially." *Woodland*, 27 F.3d at 1384. As with the effect analysis under the *Lemon* test, whether government conduct appears preferential or discriminatory is contextual. *Id.* (noting that the witchcraft selections in the teaching guide series do not give the appearance of a preference for witchcraft in the context of the wide variety of other cultural selections in the series). Moreover, the focus apparently is on whether the government's conduct objectively demonstrates preference or discrimination. *See Philibosian*, 157 Cal.App.3d at 1092.

Plaintiffs' authorities relate to the "preference" portion of the clause rather than the "discrimination" portion. *Woodland* considered whether the governments' conduct appeared to "endorse" witchcraft, and *Philibosian* analyzed whether the government's conduct expressed a preference for a particular religious viewpoint. *Woodland*, 27 F.3d at 1385; *Philibosian*, 157 Cal.App.3d at 1092. *See also Fox v. City of Los Angeles*, 22 Cal.3d 792, 805 (Ca. 1978) (ruling the threat, however small, to religious freedom that results whenever government joins its power

with a particular religious tradition). In the instant case, as already discussed, the primary effect of the City's conduct is secular in tone and nature. Although a disapproval of plaintiff's religious beliefs is one plausible effect, it is not the primary effect. Plaintiffs have failed to demonstrate that a complaint adequately alleges a claim under the No Preference Clause merely by alleging that one of the numerous otherwise secular, legitimate effects of the government's conduct was an apparent disapproval of plaintiffs' religious beliefs. The No Preference Clause claim is DISMISSED WITHOUT LEAVE TO AMEND.

D. Hybrid Claims under Federal and State Constitutions

In their second cause of action, plaintiffs allege a "hybrid-rights claim." In *Smith*, the Court observed that free exercise claims that implicated other constitutional protections, such as parental rights or free speech, could qualify for strict scrutiny even if challenging a neutral, generally applicable law under a "hybrid-rights" claim. *Smith*, 494 U.S. at 882. One situation in which such a claim may be viable is when the law regulates "the communication of religious beliefs." *Id.* This Circuit recently stated the standard for a hybrid-rights claim: "a free exercise plaintiff must make out a colorable claim that a companion right has been violated – that is, a fair probability or a likelihood but not a certitude, of success on the merits." *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) (internal quotation and citation omitted). In the instant case, plaintiffs have not alleged a colorable free speech theory. As a result, its hybrid-rights claim is unavailing.

In support of the free speech portion of their hybrid rights claim, plaintiffs contend that the defendants have (1) prescribed an orthodoxy of belief on homosexuality and (2) engaged in viewpoint discrimination. Plaintiffs' case authority does not support their lofty statements of general principle. Their free speech claim lacks merit.

Plaintiffs' first theory – compelled orthodoxy of belief – is missing a fundamental element: either a sanction or a threat of a sanction. Plaintiffs focus their free speech argument on the "coercive effect of the City's condemnatory actions." (Opp'n at 18 n.5). Undeniably, "the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence" stands at the center of the First Amendment's protection. *Turner Broadcasting System Inc. v. FCC*, 512 U.S. 622, 641 (1994). This principle, however, does not prevent a government from criticizing, even in condemnatory and vociferous fashion, a private citizen's speech. *Penthouse Int'l v. Meese*, 939 F.2d 1011, 1015-6 (D.D.C. 1991). Public criticisms, even on matters on which the government lacks regulatory authority, are inherent in the duties of public service. *Id.* at 1015. The focal point for a First Amendment claim is not whether the government publicly criticized a speaker but rather whether it sanctioned or threatened imposition of *governmental* power or sanction. *Id.* at 1015-6 ("[T]he Supreme Court has never found a government abridgement of First Amendment rights in the absence of some actual or threatened imposition of governmental power or sanction."); *see Maxwell Co. v. Borough of New Hope*, 735 F.2d 85, 88 (3d Cir. 1984) (no government coercion when a private speaker removed billboards because no enforceable threats or other evidence of coercion were presented). The fact that a private citizen

is subjectively chilled in his speech is not an adequate basis for a First Amendment violation. *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). One searches vainly through plaintiffs' complaint for any allegation of a threat of government sanction.

Plaintiffs' authorities all involve conduct beyond mere government criticism of the citizen's speech. *See e.g. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 581 (1995) (attempt to use state law to require private parade contingent to alter its message in a manner deemed more acceptable by others); *West Virginia State Board of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) (government resolution compelling the flag salute and pledge). In the instant case, defendants sharply criticized plaintiffs' speech, terming it "hateful rhetoric." They apparently did not threaten any government repercussion. In urging action from other private actors, they do not threaten them with any sanction nor promise them with any reward. Rather, based on the facts pled, the City merely exercised its duty as a public body to address a matter allegedly relating to public safety. Any subjective chill felt by plaintiffs is an insufficient buttress of a free speech action.

Plaintiffs' viewpoint discrimination argument fails for much the same reason. In plaintiffs' lead case, *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), the University of Virginia refused to authorize payments to a student publication primarily concerned with the promotion of the Christian viewpoint. The University authorized payments for other student publications. *Rosenberger*, 515 U.S. at 825. The Court deemed this denial of financial support impermissible viewpoint discrimination under the First Amendment. *Id.*

at 837. The Court's opening substantive line immediately distinguished that case from this one: "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Id.* at 828. Imposing financial burdens based on content is a form of regulation. *Id.* at 828. Plaintiffs have presented no authority holding that government speech criticizing a citizen's speech is a form of regulation.

Because plaintiffs' free speech allegations do not support even a colorable claim, their hybrid-rights claim is unavailing. It is DISMISSED. Even though defendants sought dismissal without leave to amend, plaintiffs have not indicated to the Court that they can allege the existence of any cognizable threat, coercion, or regulation. The hybrid-rights claim is dismissed WITHOUT LEAVE TO AMEND

II. Motion to Strike under 12(f)

Defendants move to strike plaintiffs' request for injunctive relief and for nominal damages on its state law claims. The plaintiffs seek to preserve their request for injunctive relief. Because plaintiffs have failed to provide even one example of an injunction against government speech, the Court GRANTS defendants' motion.

A. Injunctive Relief

In their prayer for relief, plaintiffs move for a preliminary and permanent injunction barring the defendants from making any further official pronouncements or declarations against plaintiffs or any groups sharing plaintiffs' religious beliefs regarding homosexuality. In

effect, plaintiffs seek a prior restraint on defendants' speech.

Because they so seriously infringe on First Amendment rights, prior restraints on speech "bear a heavy presumption of unconstitutionality." *United States v Baugh*, 187 F.3d 1037, 1042 (9th Cir. 1999). This rule reflects a societal preference for "punish[ing] the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). The First Amendment, however, arguably does not provide protection to governmental entities, such as municipalities. *See Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990); *NAACP v. Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990). Rather, it arguably merely protects citizens' speech from government regulation. *Hunt*, 891 F.2d at 1565. *But see Creek v. Westhaven*, 80 F.3d 186, 193 (7th Cir. 1996) (observing that a curtailment on a municipality's speech rights might constitute a limitation on the First Amendment rights of the citizens of the municipality); *Bradbury v. Superior Court of Ventura County*, 49 Cal.App.4th 1108, 1116 (Cal.Ct.App. 1996) (extending limited First Amendment protection to government speech); *County of Suffolk v. Long Island Lighting Co.*, 710 F.Supp. 1387, 1390 (E.D. NY 1989) (finding that the First Amendment protects a municipal corporation).

Regardless of whether the First Amendment provides any protection to municipalities, courts have recognized an important speaking role for municipalities for sustaining a healthy marketplace of ideas on matters of public concern. *See Alameda Newspapers Inc v. City of Oakland*, 95 F.3d 1406, 1414 (9th Cir. 1996) (acknowledging the long tradition

of cities, counties, and states issuing statements on matters of public interest); *Warner Cable,* 911 F.2d at 638 (recognizing the ability of government speech to serve the first amendment interest of making speech more available to citizens); *Westhaven*, 80 F.3d at 193. A municipality arguably can amplify voices otherwise unlikely to be heard. *Westhaven*, 80 F.3d at 193. Plaintiffs have not presented one case in which a court enjoined a government from speaking in opposition to a citizens' views on a matter pertaining to the public interest.[9] *See generally Alameda*, 95 F.3d at 1414 ("We are not aware of any case in which a court has ever held that a local government is preempted by federal law from [issuing pronouncements, proclamations, and statements of principle on matters of public interest], let alone has enjoined state or local officials from engaging in such expressive conduct."). Assuming arguendo that the First Amendment does not protect government speech, that finding in no way means that private individuals are entitled to limit or control government speech. *Muir v. Alabama Educational Television Commission*, 688 F.2d 1033, 1038 and 1038 n.12 (5th Cir. 1982). Absent any precedent for silencing a municipality

[9] The Court uncovered one case in a somewhat analogous context in which a court enjoined a county's speech. In *Granzeier v. Middleton*, 955 F.Supp. 741 (E.D. KY 1997), the court ruled that a sign bearing a depiction of the crucifixion of Christ and stating that county offices would be closed in observance of Good Friday violated the Establishment Clause. *Granzeier*, 955 F.Supp. at 746. Accordingly, the court enjoined the county from using that particular sign in the future. This example of a prior restraint does not raise many of the usual concerns with restraining speech in that it restrained very particular speech – the particular sign adjudged to violate the First Amendment – and thus did not chill the government from speech that does not run afoul of the Establishment Clause.

in the exercise of a core, if not constitutionally protected, role, this Court agrees with defendants that plaintiffs' request for a prior restraint should be STRICKEN.[10] Absent legislative limitation, the government's freedom to speak is the norm in our society. *Muir*, 688 F.2d at 1038 n.12.

B. Nominal Damages

Plaintiffs concede that they are not seeking nominal damages for their state constitutional claims. Thus, the defendants' motion to strike plaintiff's request for nominal damages under state law is DENIED as moot.

III. Motion to Strike State Claims under "Anti-SLAPP Statute"

A SLAPP suit is "a meritless suit filed primarily to chill the defendants' exercise of First Amendment rights." *Bradbury*, 49 Cal.App.4th at 1113. The Anti-SLAPP provision permits a defendant to bring a cause of action that challenges any act by her in furtherance of her right of petition or free speech under the federal or California constitutions and in connection with a public issue to bring a motion to strike pursuant to which the plaintiff's claim is stricken "unless the court determines that the plaintiff has established that there is a probability that [she] will prevail on the claim." Cal. Civ. Pro. § 425.16(b)(1). If a defendant prevails on a special motion to strike, she "**shall**"

---

[10] Plaintiffs have not pled any facts indicating that they could overcome the presumption of unconstitutionality that arguably attaches to a prior restraint on government speech.

be entitled to recover her attorney's fees and costs. *Id.* at (c) (emphasis added). On the other hand, a frivolous special motion to strike shall result in an award of costs and reasonable attorney's fees to the prevailing plaintiff. *Id.*

Sections (b) and (c) of the Anti-SLAPP provision, at least, apply in federal court. *United States v. Lockheed Missiles & Space Co.. Inc.*, 190 F.3d 963, 973 (9th Cir. 1999). When a defendant brings a special motion to strike based on deficiencies in the complaint, the Court should conduct the "probability of success" analysis pursuant to the standard of Rule 12(b)(6). *Rogers v. Home Shopping Network*, 57 F.Supp.2d 973, 983 (C.D. Cal. 1999) (Pregerson, J.).

The central issue presented by the Anti-SLAPP statute in this case is whether the statute protects government speech. This issue arises in the threshold requirement under the statute for prevailing on a special motion: a prima facie showing that the suit at issue arose from an act "'in furtherance of the [defendants'] right of petition or free speech under the United States or California constitution in connection with a public issue.'" *Lockheed*, 190 F.3d at 971 (quoting § 425.16(b)(1)). Pursuant to the act, a "person" may bring a special motion, but no definition of person is provided. Cal. Civ. Pro. § 425.16(b)(1). The impetus for the statute was "the legislature's concern about civil actions aimed at **private citizens** to deter or punish them for exercising their political or legal rights." *Lockheed*, 190 F.3d at 970 (emphasis added). Nevertheless, one California court has concluded that "person" includes a governmental entity because, among other reasons, a government cannot speak but through its individual representatives. *Bradbury*, 49 Cal.App.4th at 1114.

Even if "person" includes a governmental entity, the question still remains whether a governmental entity holds any First Amendment rights. *Bradbury* found that, at least in the context of public investigations, the government has the right "to keep the public informed, issue the report, respond to media questions, and ask other law enforcement agencies to conduct their own investigation." *Bradbury*, 49 Cal.App.4th at 1116. That court further suggested that First Amendment protection of government speech facilitates the exchange of ideas between the government and the public, thus permitting the government to inform and to educate. *Id.* at 1118.

Although instructive, *Bradbury* is not binding on a matter of federal law. The federal Court of Appeal precedents discussed previously (*see Muir, Hunt, Warner Cable*) indicate that the First Amendment does not protect government speech. *See Columbia Broadcasting Systems Inc v Democratic National Committee*, 412 U.S. 94 (1973) (Stewart, J. concurring) ("The first Amendment protects the press from governmental interference). Although *Bradbury* paints a nice theory why the First Amendment should apply to government speech, it fails to demonstrate that it does. The Court concludes that the Anti-SLAPP statute is not available to defendants in this case since they are governmental entities and officials.[11]

---

[11] Plaintiff contends the special motion to strike is "frivolous." This argument fails. To the extent plaintiffs attribute a proposed finding of frivolousness to their assertion that the anti-SLAPP statute does not protect government speech, that issue presents a close call, especially in light of *Bradbury*.

CONCLUSION

Regardless of whether the First Amendment protects the government's speech, nothing prevents it from speaking, even in criticism of a private citizen's speech. In this case, the government has spoken frequently in express opposition to opinions, both religious and secular, asserted by religious groups. Plaintiffs' allegations have failed to assert that the governments' speech violated the Establishment Clause of either the state or federal constitution. Likewise, they fail to allege a sufficient basis for a hybrid-rights claim. Finally, because plaintiffs fail to allege any burden other than a subjective chill on their Free Exercise rights, they fail to allege a Free Exercise violation.

IT IS HEREBY ORDERED THAT plaintiffs' Establishment Clause Claims are DISMISSED WITH LEAVE TO AMEND.

IT IS FURTHER ORDERED THAT plaintiffs' Free Exercise Clause Claims are DISMISSED WITHOUT LEAVE TO AMEND.

IT IS FURTHER ORDERED THAT plaintiffs' hybrid-rights claim is DISMISSED WITHOUT LEAVE TO AMEND.

IT IS FURTHER ORDERED THAT plaintiffs' No Preference Clause Claim is DISMISSED WITHOUT LEAVE TO AMEND.

IT IS FURTHER ORDERED THAT defendants' Motion to Strike plaintiffs' request for an injunction is GRANTED.

IT IS FURTHER ORDERED THAT defendants' Motion to Strike plaintiffs' request for nominal damages on the state law claims is DENIED as moot.

IT IS FURTHER ORDERED THAT defendants' Anti-SLAPP motion is DENIED.

IT IS FURTHER ORDERED THAT plaintiffs shall file an amended complaint, if they opt to do so, no later than June 22, 2000.

IT IS FURTHER ORDERED THAT a telephonic Case Management Conference ("CMC") is scheduled for **July 27, 2000 at 3:30 p.m.** The parties shall file a **joint** CMC statement at least ten (10) days prior to the conference. Failure to timely file a case management conference statement may result in the imposition of monetary and/or terminating sanctions. **Plaintiff's counsel** is to set up the conference call with all the parties on the line and call chambers at (510) 637-3559 at the time designated above. **NO PARTY SHALL CONTACT CHAMBERS DIRECTLY WITHOUT PRIOR AUTHORIZATION OF THE COURT.**

IT IS SO ORDERED.

June 2, 2000

/s/ Saundra Brown Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMERICAN FAMILY ASSOCIATION INC.; DONALD WILDMON; KERUSSO MINISTRIES; FAMILY RESEARCH COUNCIL, Plaintiffs-Appellants, v. CITY AND COUNTY OF SAN FRANCISCO; LESLIE KATZ, in her official capacity as a member of the San Francisco Board of Supervisors, Defendants-Appellees.	No. 00-16415 D.C. No. CV-99-04469-SBA (Northern District of California) ORDER (Filed Apr. 30, 2002)

Before: NOONAN, HAWKINS and TASHIMA, Circuit Judges.

Judges Hawkins and Tashima voted to deny the petition for panel rehearing and for rehearing en banc. Judge Noonan voted to grant the petition for panel rehearing and recommended rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

Toward a new national discussion of homosexuality.

[Picture Omitted In Printing]

We're standing for the truth
that homosexuals can change.

Thousands of former homosexuals can celebrate a new life because someone cared enough to share with them the truth of God's healing love. Thank you Trent Lott, Reggie White, and recording artists Angie and Debbie Winans for having the courage to speak the truth about sexual sin.

Senate Majority Leader Trent Lott
when asked whether homosexuality was a sin, said:

"Yes it is . . . in America right now there's an element that wants to make that alternative lifestyle acceptable. You still love that person and you should try not to mistreat them or treat them as outcasts. You should try to show them a way to deal with that."

If you love someone, you'll tell them the truth.

You might be shocked to know that most Christians who speak against homosexual behavior are motivated more by love than hate. Of course, "hate" gets all the headlines, but the truth still remains . . . We believe every human being is precious to God and is entitled to respect. But when we see great suffering among homosexuals, it's an inherent Christian calling to show compassion and concern. The truth we know is that God abhors any form of sexual sin, be it premarital sex, adultery, prostitution, or homosexuality. And if you were trapped in some self-destructive behavior, wouldn't you want someone to care?

Calling homosexual behavior sin is not anti-gay, it's pro-life.

We've seen the statistics . . . and they don't lie. Homosexual behavior is not healthy behavior when it accounts for a disproportionate number of sexually transmitted diseases (STD's) such as Gonorrhea, and Hepatitis A and B[1]; when 65% of all reported AIDS cases among males since 1981 have been men engaged in homosexual behavior[2]; and when homosexual *youth* are twenty-three times more likely to contract STD's than heterosexuals.[3] The cultural answer? More condoms! Yet its been proved that condoms don't protect against all contact STD's. In fact, they often fail . . . and they're also not designed to protect against the emotional damage done to your heart.

Homosexuality is not a sex issue . . . it's a heart issue.

There are problems for homosexuals even condoms can't fix. Studies also show a high degree of destructive behavior among homosexuals, including alcohol, drug abuse and emotional and physical violence.[4] And it occurs even in homosexual-affirming cities like San Francisco. So,

---

(1) Mireya Navarro, "Federal Officials See Sharp Rise Of Hepatitis Among Gay Men," The New York Times, March 6, 1992 (2) Centers for Disease Control, HIV/AIDS Surveillance Report, Vol.9, No.2, May, 1998 (3) American Adolescence: How Healthy Are They?, p. 31, American Medical Association, 1990 (4) Robert Garofalo and others, "The Association Between Health Risk Behaviors and Sexual Orientation Among a School-based Sample of Adolescents," Pediatrics, 101 pp 895-902, (1998).

it's not lack of acceptance . . . it's behavior – the visible response to a broken heart.

The truth may hurt before it can heal.
But change is possible.

Thousands of stories from "ex-gays" (like those pictured above) confirm what counselors and pastors see every day. Homosexuals routinely describe deep-seated, almost unconscious desires that drive a same-sex urge. They also tell of rejection from early childhood and lack of bonding to same-sex parents, sexual violence and rape, or mental and emotional abuse as critical elements in the formation of their gender-identity. But these life situations don't deny the choice each makes in yielding to temptation, no matter how strong the urge. Still, many have walked out of homosexuality . . . into sexual celibacy or even marriage. How? Often because someone cared enough to love them, despite where they were, and to confront the truth of their sexual sin. For the Christian, that love comes in the person of Jesus Christ and motivates our commitment to this issue.

We don't need to be perfect to talk about sin.

Quite the contrary. A sinner can spot sin a mile away. Just ask Trent Lott. Or Reggie White. They'd be the first to tell you they're far from perfect. The truth is we are all sinners. The critical difference in this debate is that some recognize their sin and repent, and others don't. That begs the larger question . . . if we can't talk about sin as a nation, just where is our moral compass pointed? And is there truth in a created moral order, or is truth anything we define it to be?

Taking a stand. Extending a hand.

For years Christians have taken a stand in the public square against aggressive homosexual activism. We've paid a heavy price, with sound-bite labels like "bigot," and "homophobe." But all along we've had a hand extended, something largely unreported in the media . . . an open hand that offers healing for homosexuals, not harassment. We want reason in this debate, not rhetoric. And we want to share the hope we have in Christ, for those who feel acceptance of homosexuality is their only hope.

You can make a difference.

We are a broad coalition representing millions of concerned families asking for an honest debate with our opponents. This is not a Republican issue . . . not a Democrat or Independent issue. It's a truth issue. We're asking you to reexamine the truth of homosexuality with ALL the facts in hand, apart from the half-truths and hostile name-calling. Ask us to explain our position on sin. Then ask the other side. But ask! Then let the real healing begin.

If you really love someone, you'll tell them the truth.

For information on contacting an ex-gay ministry
in your area or contacting Parents and Friends of Ex-gays,
please call 888-264-0877

[SEAL]

BOARD of SUPERVISORS

**401 Van Ness Avenue,
Room 308
San Francisco
94102-4532
Tel. No. 554-5184
TDD No. 554-5227**

October 19, 1998

Coral Ridge Ministries
Center for Reclaiming America
P.O. Box 40
Fort Lauderdale, Florida 33302

Christian Coalition
P.O. Box 1990
Chesapeake, Virginia 23327

Donald Wildmon
American Family Association
P.O. Office Drawer 2440
Tupelo, Mississippi 38803

Family Research Council
801 G. Street NW
Washington, DC 20001

Honorable Newt Gingrich
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Honorable Trent Lott
United States Senate
Washington, DC 20510

Honorable Jesse Helms
United States Senate
Washington, DC 20510

Ladies and Gentlemen:

I am writing at the direction of the Board of Supervisors concerning hate crimes which was discussed at their meeting of October 13, 1998.

Supervisor Leslie Katz denounces your hateful rhetoric against gays, lesbians and transgendered people.

What happened to Matthew Shepard is in part due to the message being espoused by your groups that gays and lesbians are not worthy of the most basic equal rights and treatment.

It is not an exaggeration to say that there is a direct correlation between these acts of discrimination, such as when gays and lesbians are called sinful and when major religious organizations say they can change if they tried, and the horrible crimes committed against gays and lesbians.

Very truly yours,

/s/ Gloria L. Young
Gloria L. Young
Clerk of the Board

FILE NO. 990454 **RESOLUTION NO. 234-99**

[Condemning the Hate Motivated Murder of Billy Jack Gaither]

CONDEMNING THE HATE MOTIVATED MURDER OF BILLY JACK GAITHER IN ALABAMA AND URGING ALABAMA LAWMAKERS TO INCLUDE SEXUAL ORIENTATION IN THEIR HATE-CRIMES LAWS WHICH CURRENTLY ONLY ADDRESS HATE CRIMES MOTIVATED BY RACE OR RELIGION.

WHEREAS, Billy Jack Gaither was brutally murdered this month in Rockford Alabama, by two acquaintances, motivated by their hatred of gays; and,

WHEREAS, This premeditated hate crime included the savage beating of Mr. Gaither with an ax handle and loading him in the truck of his own car to be transported to another County where he was beaten again and his body was set on fire atop burning tires; and,

WHEREAS, The two perpetrators of this crime, young men ages 21 and 25, have confessed to the crime and have stated that they plotted this brutal murder for two weeks because they were angry about an unwanted sexual advance they claimed was made by Mr. Gaither; and,

WHEREAS, Killing a fellow human being is not an appropriate response to an unwanted sexual advance; and,

WHEREAS, Hate crimes related to sexual orientation are on the rise in the United States; and,

WHEREAS, Alabama is one of 19 states with hate-crime laws that do not cover offenses related to sexual orientation; now, therefore, be it

RESOLVED, That the City and County of San Francisco urges Alabama lawmakers to support State Representative Alvin Holmes' bill that would extend Alabama's hate-crime laws to include sexual orientation; and, be it

FURTHER RESOLVED, That the City and County of San Francisco commends the local organization Community United Against Violence (CUAV) for protecting San Francisco residents from such hate crimes and for offering to provide assistance and counseling to those affected by the brutal murder of Mr. Gaither in Alabama; and, be it

FURTHER RESOLVED, That the City and County of San Francisco of San Francisco [sic] calls for the Religious Right to take accountability for the impact of their long-standing rhetoric denouncing gays and lesbians, which leads to a climate of mistrust and discrimination that can open the door to horrible crimes, such as those committed against Mr. Gaither.

FILE NO. 98-1715 **RESOLUTION NO.** 873-98

[Rejection of Anti-Gay Ads]

URGING LOCAL TELEVISION STATIONS TO NOT BROADCAST ANTI-GAY TELEVISION ADVERTISEMENTS.

WHEREAS, The majority of Americans believe in fair and equal treatment of gays and lesbians with respect to basic rights such as employment and housing; and,

WHEREAS, San Francisco supports and accepts an active and self-respecting gay and lesbian community; and,

WHEREAS, A coalition of religious political conservative organizations have introduced a nation-wide television advertisement campaign to encourage gays and lesbians to change their sexual orientation; and,

WHEREAS, This coalition includes the Family Research Council, the Concerned Women for America, and the Center for Reclaiming America; and,

WHEREAS, The aforementioned organizations promote an agenda which denies basic equal rights for gays and lesbians and routinely state their opposition to toleration of gay and lesbian citizens; and,

WHEREAS, The radical religious political conservative coalition previously introduced a printed advertisement campaign which a prominent San Francisco newspaper chose to accept and publish; and,

WHEREAS, The vast majority of medical, psychological, and sociological evidence supports the conclusion that sexual orientation can not be changed; and,

WHEREAS, Advertising campaigns which insinuate sexual orientation can be changed by conversion therapy or other means are erroneous and full of lies; and,

WHEREAS, Advertising campaigns which insinuate a gay or lesbian sexual orientation is immoral and undesirable create an atmosphere which validates oppression of gays and lesbians and encourages maltreatment of gays and lesbians; and,

WHEREAS, There is a marked increase in anti-gay violence which coincides with defamatory and erroneous campaigns against gays and lesbians; and,

WHEREAS, An unfortunate, extreme result of these anti-gay campaigns is violence and even death; now, therefore, be it

RESOLVED, That the Board of Supervisors of the City and County of San Francisco urges local television stations not to broadcast advertising campaigns aimed at "converting" homosexuals.